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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 374.

THE UNION MUTUAL LIFE INSURANCE COMPANY OF MAINE, PLAINTIFFS IN ERROR,

vs.

MARTROM D. LEWIS, PUBLIC ADMINISTRATOR, ETC., OF THE ESTATE OF WILLIAM S. BERTON, DECEASED.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

FILED MAY 16, 1877.

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1 *Writ of error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States for the eastern district of Missouri, greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, at the September term, 1876, thereof, between Martrom D. Lewis, public administrator of S't Louis County, Missouri, in charge of the estate of William S. Berton, deceased, plaintiff, and the Union Mutual Life Insurance Company of Maine, defendant, a manifest error hath happened, to the great damage of the said defendant as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States together with this writ, so that you have the same at Washington, D. C., on the second Monday of October next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid, being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 12th day of January, in the year of our Lord one thousand eight hundred and seventy-seven.

Issued at office in the city of S't Louis, with the seal of the circuit court of the United States for the eastern district of Missouri, dated as aforesaid.

[SEAL.] M. M. PRICE,
Clerk Circuit Court United States, Eastern District of Missouri.
By A. P. SELBY,
Deputy.

Allowed by—

SAMUEL TREAT, *Judge.*

2 *Return to writ.*

UNITED STATES OF AMERICA,
Eastern District of Missouri, ss:

In obedience to the command of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the *the* record and proceedings in the within entitled case, with all things concerning the same.

In witness whereof I hereto subscribe my name and affix the seal of said circuit court, at office in the city of S't Louis, this 14th day of February, A. D. 1877.

[SEAL.] M. M. PRICE,
Clerk of said Court.
By A. P. SELBY, *Deputy.*

3, 4 *Citation.*

The United States of America to Martrom D. Louis, public administrator of S't Louis County, Missouri, in charge of the estate of William S. Berton, deceased, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, D. C., on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the eastern district of Missouri, wherein the Union Mutual Life Insurance Company of Maine, plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Samuel Treat, judge of the circuit court of the United States for the eastern district of Missouri, this 12th day of January, in the year of our Lord one thousand eight hundred and seventy-seven.

SAMUEL TREAT,
Judge United States Circuit Court, Eastern District of Missouri.

Formal service of citation is waived this 29th March, 1877.

W'M S. BODLEY,
Att'y for Pl'ft.

5 *Petition.*

THE UNITED STATES OF AMERICA,
Eastern District of Missouri, sct:

Be it remembered that heretofore, to wit, on the first day of March, A. D. 1876, there was filed in the office of the clerk of the circuit court of the United States for the eastern district of Missouri, a certain transcript from the circuit court of S't Louis County, Missouri, which said transcript is in the words and figures following, to wit:

STATE OF MISSOURI,
County of S't Louis, ss:

Be it remembered that heretofore, to wit, on the 17th day of September, A. D. 1875, there was filed in the office of the clerk of the circuit court of S't Louis County, a petition, which is in words and figures following, to wit:

In the circuit court of Saint Louis County. October term, A. D. 1875.

STATE OF MISSOURI,
County of S't Louis, ss:

MARTROM D. LEWIS, PUBLIC ADMINISTRATOR of S't Louis County, in charge of the estate of William S. Berton, deceased, plaintiff,
vs.
UNION MUTUAL LIFE INSURANCE COMPANY OF Maine, a corporation, defendant.

Plaintiff states, that on the 7th day of December, A. D. 1874, the said Martrom D. Lewis, was duly appointed by the governor of the

State of Missouri, to the office of public administrator of said S't Louis County; that the 11th day of said December, the plaintiff duly qualified as such administrator; that afterwards, on the 17th day of September, A. D. 1875, the plaintiff, as such administrator, took charge of the estate of William S. Berton, deceased, on said 17th day of September, filing a notice of the fact of his taking possession of said estate in the office of the clerk of the probate court of said S't Louis County, and making due publication thereof according to law; that the defendant is a corporation duly incorporated under the laws of the State
6 of Maine, and is doing business in the State of Missouri, by and through its authorized agents in conformity to the laws of said State of Missouri, and has a business office in said county of S't Louis; that on the 30th day of July, A. D. 1873, at noon, for a valuable consideration paid by William S. Berton, to the defendant, said defendant by agents duly authorized thereto, made policy of insurance in writing, which policy of insurance is herewith filed marked "Exhibit A," and thereby insured the life of said William S. Berton in the sum of five thousand (5,000) dollars; that on the 31st day of March, 1874, during the continuance of said policy and risk, said William S. Berton died; that said William S. Berton and said plaintiff each duly fulfilled all the conditions of said insurance on his part; that said defendant has and still doth wilfully, vexaciously, and maliciously refuse to pay said insurance; that no part of said sum of five thousand dollars has been paid, and the said sum is now due thereon from said defendant to said plaintiff as administrator as aforesaid.

Wherefore plaintiff prays judgment for said sum of five thousand dollars with interest thereon from the said 31st day of March, together with statutory damages for the malicious and vexacious refusal of the said defendant to pay the same and his costs.

W'M S. BODLEY,
Att'y for Pl'ff.

Policy.

UNION MUTUAL LIFE INSURANCE COMPANY OF MAINE.

Dollars, 5,000. Premium, 137.60.

No. 45915.] Directors' office, Boston, Mass. [Age 38.

Form A/S. Annual life payments.

This policy of insurance witnesseth, that whereas William S. Berton of Milwaukee, county of Milwaukee, State of Wisconsin, has applied to the Union Mutual Life Insurance Company, by his application, dated July 24, 1873, for insurance on the life of himself of county of , State , and has also agreed to pay the sum of one hundred thirty-seven dollars and sixty cents, as the annual premium
7 therefor, on or before the thirtieth day of July in every year during the continuance of the policy.

And now, the first payment of the before mentioned annual premiums having first been received by the company, or their accredited agent, during the lifetime and good health of the said insured, as is hereinafter provided, and not otherwise, and in consideration of such payment having been so received, and of the provisions herein for future payments of premiums, and of the representations made to them in the aforesaid

application for this policy, the said company do hereby insure the life of William S. Berton, aforesaid, in the amount of five thousand dollars, from the 30th day of July, 1873, at noon, for and during the term of his whole life, for the sole and separate use and benefit of the said William S. Berton.

And the said company do hereby promise to, and agree with, the said assured, his executors, administrators, and assigns, well and truly to pay the sum insured to the said assured, his executors, administrators, or assigns, three months after due notice and satisfactory proof of the death of the said insured during the continuance and before the termination of this policy, and of the just claim of the assured or of any other person as executor, administrator, guardian, or assign of the assured under it.

It is understood and agreed that after three annual premiums herein provided for have been fully paid, the company will at any time pay the holder of this policy its fair value, in cash, upon its surrender while in force; or in lieu of such cash value a paid up policy for an equitable amount will be granted. Provided especially, that this policy is issued, and it is accepted by the assured and the said applicant, upon the express conditions and agreements set forth on the back hereof, and that they shall constitute a part of this contract in the same manner and to the same extent as if they were printed in the body of the policy, and are to be referred to in order to ascertain and explain the rights and obligations of the parties hereto in all cases.

In witness whereof the said Union Mutual Life Insurance
8 have by their president and secretary signed this contract at their office, in Boston, this thirtieth day of July, one thousand eight hundred and seventy-three, but the same shall not be binding until delivered, and the advance premium is paid; nor unless the party is alive and in sound health at the date of such payment, except when a conditional binding receipt shall have been previously given, and prepayment of the whole premium thereupon been received.

HENRY CROCKER, *President.*

W. H. HOLLISTER, *Secretary.*

"Express conditions and agreements" upon which the within policy is issued.

First. The full amount of the premium must be paid on the day and in the manner herein provided for; and if any note, check, or draft shall be given and accepted in payment, or part payment, of any premium due, or to become due, such note, check, or draft must be paid strictly in accordance with the provisions thereof severally. If any such annual premium, or any such note, check, or draft, shall not be so paid, then this policy shall immediately become void, except as respects payments for prior years, which shall have been realized by the company in all respects according to their terms, and the benefits thereof been thus secured from forfeiture.

The company are under no obligations to revive or renew any voided policy; should they upon any occasion do so by the acceptance of any overdue premium or interest, each such acceptance must be considered an independent act of grace or courtesy, in nowise creating any obligation or precedent for the future waiver of any condition in the policy.

Premiums are payable at the company's office in Boston, Mass., and no person whatever is authorized to collect payment elsewhere of any annual premium except with a special certificate of such authority, signed by the secretary, stating the specific payment for which it is

issued, and attached to which must be the receipt to be given for
9 that payment; and such special certificate is the only evidence to the policy holder of the authority of any person to receive the renewal premium.

Second. The assured has liberty to travel by land or, as passenger, by water, to any port or place between the parallels of the Tropic of Cancer and the Arctic Circle, and to reside within those limits; also to make voyages as master mariner, mate, or other officer, supercargo, or passenger, in good sea-worthy vessels or regular line steamers, between ports within the aforesaid parallels and the island of Cuba; also between said parallels on the Pacific coast to and between the Sandwich Islands, and to reside therein, and to China and Japan, and return; also to make passages between the aforesaid parallels in the North Atlantic and the same in the North Pacific Oceans by the way of the Isthmus of Darien.

Third. In case the death of the insured shall be caused by the employment of said person in underground mining or in the manufacture or transportation of gunpowder, nitro-glycerine, dualin, or any other highly explosive compound, or as brakeman or fireman upon a railroad train or steamboat, said company shall not be liable to pay the loss, unless it shall have given liberty to engage in such employment, which liberty, if applied for, shall be given for a fair additional premium.

Fourth. If the insured shall die by reason of any violent act of self-destruction whatever, whether at the time of committing the same he be sane or insane, this company will return and pay over to the assured the whole amount it had previously received as premiums herefor, less the amounts which shall have been returned by the company as surplus premium or dividends, provided that this policy be returned and surrendered to the company, with all other claims under it of whatever nature, within three months after filing acceptable proofs of said death; and said company shall not be liable for any other or further payment
10 in any other manner or time whatever.

Fifth. If, except as provided herein, the said insured shall, without the consent of the company previously given in writing, pass beyond the limits named in the second of these conditions, or shall, without such consent, be engaged in any military or naval service in time of war, or shall die in consequence of a duel, or by the hands of justice, or in consequence of violating or attempting to violate the laws of any state, country, or province, or shall become so far intemperate or addicted to any vice or habit as to seriously and permanently impair his health or induce delirium tremens, then this policy shall be null and void.

Sixth. The application herefor shall form and be a part of this policy; and if any statement made therein, or in the medical examiner's certificate accompanying it, by the applicant or the person whose life was to be insured, shall be found untrue in any respect, then this policy shall be null and void.

Seventh. No agent of this company, except the president or secretary, shall waive or alter any condition expressed in this policy or in any note, check, or draft given to and accepted by the company in settlement of any premium or parts of premium for this policy.

Eighth. The term "cash-note," when used by this company, means a conditional note which may be given at the annual settlement of the premium. The "insured" under this policy is understood to be the person whose life is at risk; the "assured," the person named as beneficiary.

Ninth. Any assignment of this policy shall be void, unless assented to in writing by the president or secretary. In case this policy becomes null and void for any of the above causes, all payments of premium made thereon and all apportionments credited thereto and remaining unpaid shall be thereby forfeited to the company, except those secured from forfeiture as mentioned in article first and article fourth.

11 Tenth. Whenever this company shall become liable for any claim under this policy, it may set off against the same all the demands the company then have, arising from or in any way connected with this insurance, whether the same are then due or not.

Whereupon a summons was issued to the sheriff of S't Louis County, which summons and the return of the sheriff thereon is in words and figures following, to wit:

Summons.

THE STATE OF MISSOURI,
County of S't Louis, ss:

To the sheriff of S't Louis County, greeting:

We command you to summon Union Mutual Life Insurance Company of Maine (corporation) to appear before the judges of our circuit court, on the first day of the next term thereof, to be held in the city of S't Louis, within and for the county of S't Louis, on the first Monday of October next, then and there to answer the complaint of Martrom D. Lewis, public administrator of S't Louis County, in charge of the estate of William S. Berton, as set forth in the annexed petition; and have you then and there this writ.

Witness, J. Fred Thornton, clerk of our said court, with the seal thereof hereto affixed, at office in the city of S't Louis, this 17th day of Sept., in the year of our Lord eighteen hundred and seventy-five.

[SEAL.] J. FRED THORNTON, *Clerk.*

Return.

Executed this writ in S't Louis County, on the 17th day of September, 1875, by delivering a copy of the writ and petition, as furnished by the clerk, to Curtis C. Gardner, agent of the Union Mutual Life Insurance Company of Maine, a corporation, who was in the business office of said company and had charge thereof at the time of said service. The president or other chief officer cannot be found in my county.

EMIL THOMAS, *Sheriff.*
HENRY ERB, *Dep'ty.*

12 And afterwards, to wit, Oct. 12th, A. D. 1875, there was filed in said cause the following petition:

Petition for removal.

Now this day comes the defendant, by its attorney, and says that it is a citizen of the State of Maine, and the plaintiff is a citizen of Missouri; that the above-entitled cause is pending in this court, being number 36076, to the October term, 1875; that this is the return term of said cause, and the first term in which said cause could be tried, and that said cause has not yet been tried; that the matter in dispute in

said cause exceeds the sum of five hundred dollars, exclusive of costs; and said defendant moves this honorable court that an order may be made removing said cause into the circuit court of the United States within & for the eastern district of Missouri, and to the next term of said court; and said defendant herewith offers a good & sufficient bond for its entering in such court on the first day of its next term, a copy of the record in said suit, and for paying all costs that may be awarded by the said circuit court, if said court shall hold that such suit was wrongfully or improperly removed thereto, according to the act of Congress in that case made and provided.

EVERETT W. PATTISON,
Attorney for Defendant.

STATE OF MISSOURI,
County of S't Louis, ss:

Everett W. Pattison, being duly sworn, on his oath says that he is the agent and attorney of the above-named defendant, and that the matters and things stated in the above petition are true.

EVERETT W. PATTISON.

Sworn to & subscribed before me this 12th day of October, 1875. Qualified Dec. 17th, 1873. Commission expires Dec. 15th, 1877.
[SEAL.] C. E. SHEDD,
Notary Public.

Bond for removal.

Know all men by these presents, that we, The Union Mutual Life Insurance Company of Maine, as principal, and William Johnson,
13 of S't Louis, as surety, are held and firmly bound unto Martrom D. Lewis, public administrator, in charge of the estate of W. S. Berton, in the sum of five hundred dollars, to the payment of which well and truly to be made we bind ourselves, our heirs, representatives, and assigns, firmly by these presents. In witness whereof, said principal has caused these presents to be signed by its president, Henry S. Washburn, and the corporate seal to be hereto affixed, and said surety has placed his hand and seal hereto, this ninth day of October, A. D. 1875.

The condition of the above obligation is as follows:

Whereas a suit has been commenced in the circuit court of S't Louis County, Missouri, by Martrom D. Lewis, public administrator in charge of the estate of William S. Berton, plaintiff, against the Union Mutual Life Insurance Company of Maine, defendant, being cause numbered 36076; and whereas a petition for the removal of said cause to the circuit court of the United States in and for the eastern district of Missouri has been filed in said cause by the said defendant, under the act of Congress in such case made and provided:

Now, if said defendant, The Union Mutual Life Insurance Company of Maine, shall enter or cause to be entered in said United States circuit court, on the first day of its next ensuing session, a copy of the record in said suit, and shall pay all costs that shall be awarded by the said United States circuit court, if said court shall hold that said suit was wrongfully or improperly removed thereto, then this obliga-

tion shall be void, otherwise the same shall remain in full force and virtue.

UNION MUTUAL LIFE INS. CO.,

[SEAL.] By HENRY S. WASHBURN, *Pres't.*
[SEAL.] WILLIAM JOHNSTON.

Witness to sig. H. S. W.
C. H. BURER.
Witness to sig. of W. J.
C. C. GARDNER.

And afterwards at the special term, being the October term of said court, A. D. 1875, the following proceedings were had in said cause, to wit:

14 *Order of removal.*

THURSDAY, *November 4th*, 1875.

On petition of defendant by attorney, this day filed, it is ordered by the court, that on the defendant's giving bond in the sum of five hundred dollars to be approved by the court, that the clerk of this court forthwith certify to the circuit court of the United States for the eastern district of Missouri a full, true, and complete transcript of the record and proceedings in his office. Bond filed and approved.

STATE OF MISSOURI,
County of S't Louis, ss:

I, J. Fred Thornton, clerk of the circuit court of S't Louis County, do hereby certify the foregoing to be a full, true, and complete transcript of the record and proceedings in the above-entitled cause, as fully as the same remain on file and of record in my office.

In testimony whereof, I hereunto set my hand, and affix the seal of said court, at office in the city of Saint Louis, this 24th day of January, A. D. 1876.

J. FRED THORNTON, *Clerk.*

And afterwards, at a regular term of the circuit court of the United States for the eastern district of Missouri, begun and holden on the third Monday of March, 1867, the defendant, on the 11th day of April, 1876, filed its answer, which is in words and figures as follows, to wit:

Answer.

In the circuit court of the United States for the eastern district of Missouri.

MARTROM D. LEWIS, PUBLIC ADMINISTRATOR of S't Louis County, &c.,
vs.
UNION MUTUAL LIFE INSURANCE COMPANY, of Maine.

Now this day comes the defendant in the above-entitled cause, and for answer to the petition of plaintiff herein says, that it is not true and therefore denies that plaintiff lawfully took charge of the estate

15 of William S. Berton at the date mentioned, or at any other time.

Defendant says that said William S. Berton did not die in S't Louis County, nor was he living in said county nor in the State of Missouri at the time of his death, or at any time prior thereto; nor did said Berton leave any money, property, papers or other estate in said county, or in said State.

And defendant further states that plaintiff was never ordered by the probate court of S't Louis County, or by any other court whatever, to take charge of said Berton's estate, and defendant says that said Berton has not now, and never has had, any estate in this county of which plaintiff could take possession, and that he was not authorized to take possession of said Berton's estate.

Defendant says it is not true, and therefore denies that on the day mentioned in said petition, or at any other time, it made its policy of insurance, insuring the life of said William S. Berton in any sum whatever, or that said William S. Berton ever paid to it any consideration whatever, valuable or otherwise, for any policy whatever, and defendant therefore further denies that said Berton or plaintiff ever fulfille l any conditions of insurance.

Whether said Berton died on the day in said petition mentioned or any other day, defendant has no knowledge nor any information sufficient to form a belief. Defendant admits that it never paid to plaintiff any sum of money on account of said Berton, and denies that any sum of money is due plaintiff as administrator or otherwise.

And defendant says that plaintiff never gave to defendant or offered to give to it any notice or proofs of said Berton's death, and never made any claim that defendant owed him any sum whatever on account of any insurance on the life of said Berton, and never offered to defendant any proof his claim to recover from defendant any sum whatever on account of said Berton.

And for further answer defendant says that on the 24th day of July, 1873, one W'm S. Berton, of Milwaukee, in the county of Mil-

16 waukee, in the State of Wisconsin, made application to defendant for insurance upon his life in the sum of five thousand dollars for the term of his natural life; that thereupon the defendant executed a policy for said sum, agreeing to pay said sum to the executors, administrators, or assigns of said Berton in three months after due notice and satisfactory proof of the death of said Berton during the continuance and before the termination of said policy, and of the just claim of said Berton, or of any other person as executor, administrator, guardian, or assign of the said Berton under it, provided the sum of one hundred and thirty-seven $\frac{60}{100}$ dollars had been first received by the defendant or its accredited agent during the lifetime and good health of said Berton, and not otherwise. And defendant says that the policy so as aforesaid executed by it contained the following clause: "but the same," meaning the said policy or contract of insurance so by it executed, "shall not be binding until delivered and the advance premium is paid;" and defendant says that said advance premium amounted to the sum of one hundred and thirty-seven $\frac{60}{100}$ dollars, as hereinbefore mentioned.

And defendant further says that said application was the basis upon which said policy was executed, and that it contained, among other agreements, the following, which was duly signed and entered into by said Berton, and formed a part of the consideration upon which said policy was executed by defendant, to wit: "And I further agree that the assurance shall not be binding until the first installment of pre-

mium (meaning the one hundred and thirty-seven $\frac{60}{100}$ dollars aforesaid) shall have been paid to said company or an accredited agent thereof during the life and good health of the party whose life is proposed for insurance."

Defendant says that it never delivered said policy to said Ber-
17 ton, and that said sum of one hundred and thirty-seven $\frac{60}{100}$ dollars, being the amount due as first premium thereon, was never paid to it or to any of its agents by said Berton, or by any person for him; and that if said Berton ever came into possession of said policy such possession was wrongful and without right, and said Berton never acquired any rights thereunder. Defendant says it is not, and never has been, legally bound by said policy, and that neither said Berton nor any representative of his has any claim thereunder.

And having fully answered, defendant asks to go hence with its costs.

EVERETT W. PATTISON,
Attorney for Defendant.

And afterward, at said term of said court, and on the 21st day of April, 1876, the plaintiff filed his replication to the defendant's answer, which is in words and figures as follows, to wit:

Reply.

In the circuit court of the United States for the eastern district of Missouri.

MARTROM D. LEWIS, PUBLIC ADMINISTRATOR of Saint Louis County, &c.,
vs.
THE UNION MUTUAL LIFE INSURANCE COMPANY of Maine.

Now this day comes the plaintiff in the above-entitled cause, and for a reply to the new matter set up in defendant's answer filed herein says, that he has no knowledge or information thereof sufficient to form a belief as to what the contents of the application pleaded by defendant are, and prays that as against this plaintiff they may be proved. Denies that said defendant never delivered said policy to said Berton, and that said Berton came into possession of said policy wrongfully and without authority; denies that said Berton never acquired any rights under said policy; denies all knowledge or information thereof sufficient to form a belief whether said sum of one hundred and
18 thirty-seven $\frac{60}{100}$ dollars, being the amount due as first premium thereon, was never paid to defendant or any of its agents by Berton or any one for him.

And for a further reply plaintiff says, that if said first premium of one hundred and thirty-seven $\frac{60}{100}$ dollars on said policy was not paid before its delivery, as the defendant has in its answer alleged, then the said policy of insurance was delivered by said defendant to said Berton, by and through its duly authorized agent or agents, said agent or agents having delivered said policy and allowed credit to said Berton for the payment of said first premium of one hundred and thirty-seven $\frac{60}{100}$ dollars; that there was no time from the delivery of said policy to the death of said Berton that the said sum could not have been collected from said Berton had said agent or agents made application for the payment of the same; that said sum of one hundred and thirty-seven $\frac{60}{100}$

dollars has been offered to said company upon its refusal to pay the amount due on account of the non-payment, as it stated, of said sum as first premium as before stated. That due notice and proof of the death of said Berton was, within a reasonable time after his death, offered to said defendant, and was refused by it on the ground that said defendant never had a risk on his (said Berton's) life.

Wherefore plaintiff prays judgment for the amounts stated in plaintiff's petition heretofore filed.

W'M S. BODLEY,
Att'y for Pl'ff.

And afterwards, to wit, at a regular term of the circuit court of the United States for the eastern district of Missouri, begun and held on the third Monday of September, 1876, the following further proceedings were had in said cause, October 12th, 1876, to wit:

M. D. LEWIS, ADM'R, &C., PLAINTIFF,
vs.
UNION MUTUAL LIFE INSURANCE CO., &C., defendant.

19 *Jury sworn.*

Now come the said parties, by their attorneys, the plaintiff by W'm S. Bodley, esquire, and defendant by E. W. Pattison, esquire, and this cause being regularly called for trial, and said parties being ready, it is ordered that a jury come, and thereupon comes said jury, to wit: E. F. Henderson, Anton Hunt, H. Glasscock, Joseph Conway, Peter Wilder, W. C. Clemison, Charles J. Carpenter, David G. Jones, J. H. Dimmitt, J. W. Barrett, W. S. M. Anderson, and E. F. Donnell, twelve good and lawful men duly sworn and empaneled well and truly to try the issues joined herein, and thereupon, the court being about to adjourn, it is ordered that further proceedings herein be continued until to-morrow morning at 10 o'clock.

And afterwards, at said term of said court, the following further proceedings were had in said cause on October 13th, 1876, to wit:

M. D. LEWIS, PUBLIC ADMINISTRATOR OF S'T Louis County, Missouri, plaintiff,
vs.
UNION MUTUAL LIFE INSURANCE CO., DEfendant.

Now again come the said parties, by their attorneys, and also come the jury aforesaid, to wit: E. F. Henderson, Anton Hunt, H. Glasscock, Joseph Conway, Peter Wilder, W. C. Clemison, Charles J. Carpenter, David G. Jones, J. H. Dimmitt, J. W. Barrett, W. S. M. Anderson, and E. F. Donnell, who, having heard the evidence, the argument of counsel, and receiving the charge of the court, return the following verdict, to wit.

Verdict.

We, the jury in the above-entitled cause, find for the plaintiff in the sum of five thousand five hundred and one dollars, without damages.

J. W. BARRETT, *Foreman.*

Judgment.

It is therefore now considered by the court that the said plaintiff, Martrom D. Lewis, public administrator of S't Louis County, Missouri, in charge of the estate of William S. Berton, deceased, have and recover against the said defendant, The Union Mutual Life-Insurance Company of Maine, as well the said sum of five thousand five hundred and one dollars, by the jury so as aforesaid assessed, as also the costs herein expended, and have thereof execution.

And afterwards, at an adjourned day of the September term,
20 1876, of said court, held on the 4th day of December, 1876, the following further proceedings were had in said cause, to wit:

M. D. LEWIS, PUBLIC ADM'R, &C., PLAINTIFF,
vs.
UNION MUTUAL LIFE-INSURANCE CO., DEFENDANT.

Now comes the defendant, by its attorney, and presents to the court its bill of exceptions, which is allowed and signed, and ordered to be filed as part of the record in this cause.

The said bill of exceptions are in words and figures as follows:

Bill of exceptions.

MARTROM D. LEWIS, PUBLIC ADMINISTRATOR, in charge of estate of William Berton,
vs.
THE UNION MUTUAL LIFE-INSURANCE COMPANY.

In the circuit court of the United States, eastern district of Missouri.

Be it remembered that the above-entitled cause came on to be heard at the September term, 1876, of said court, before the honorable Samuel Treat, holding said court, and a jury, when the following proceedings were had:

Pl'ff's evidence.

Plaintiff, to maintain the issue on his part, introduced in evidence the policy sued on and executed by defendant, being in words and figures as follows, to wit:

(Policy annexed to petition, and entered on page 6 of this record.)

Plaintiff then offered in evidence a certified copy of the letters of administration of plaintiff, containing the notice that he had taken charge of the estate of William S. Berton, being in words and figures as follows, to wit:

Public adm'r's notice.

STATE OF MISSOURI,
County of S't Louis, ss:

To the Hon. J. G. Woerner, judge of the probate court of S't Louis County:

Notice is hereby given to creditors and all other persons interested in

the estate of William S. Berton, late of the county of S't Louis,
21 deceased, that I, the undersigned, public administrator within and for the county aforesaid, have this day taken charge of said estate for the purpose of administering the same.

Given under my hand this seventeenth day of September, A. D. 1875.

MARTROM D. LEWIS,
Public Administrator.

Letters of administration.

STATE OF MISSOURI,
County of S't Louis, ss:

I, William E. Wagner, clerk of the probate court of the county of S't Louis, do hereby certify that the foregoing is a true copy of a notice filed in my office on the seventeenth day of September, 1875, by Martrom D. Lewis, public administrator, of his having taken charge of the estate of William S. Berton, deceased, whereby he is duly authorized and empowed to secure and dispose of the property of said deceased according to law, collect all moneys due said deceased, and in general to do and perform all other acts and things which are, or hereafter may be, required of him by law.

And I further certify that said Martrom D. Lewis, whose name is subscribed to said notice, is the public administrator of S't Louis County, duly appointed, qualified, and acting in that capacity.

In witness whereof I hereto set my hand and affix the seal of said court, at office, this second day of October, 1876.

[SEAL.] W. E. WAGNER, *Clerk*,
By C. B. McINTIRE, *D. C.*

To the introduction of this paper, defendant, by its counsel, objected, for the reason that it was admitted by the pleadings that none of the causes existed which would authorize the public administrator of S't Louis County to take charge of the estate of said Berton, it being alleged in the answer, and not denied in the reply, that said Berton had never lived in S't Louis County, and did not die in said county, and that no money, papers, or property of any kind were left by said
22 Berton in said county, and that the probate court of S't Louis County had never ordered said public administrator to take charge of said estate.

Said objection was overruled by the court, and the paper admitted, to which ruling of the court defendant at the time excepted.

Plaintiff then read in evidence the depositions of A. J. Cooper and of D'r C. H. Orton, being in words and figures as follows, to wit:

A. J. COOPER.

My name is Arthur J. Cooper. I reside in the city and county of Milwaukee, State of Wisconsin, and am agent of the Erie and North Shore Line. I knew William S. Burton in his lifetime. He was with me in the same office at the time of his death. He died some time in March, 1874, in the city of Milwaukee. M'r's Berton, his wife, gave me the keys of his desk after his death. I went and opened the desk and found two policies: one a Chicago company's policy, and the other the policy in question. I handed the same to M'r Kurtz Muller, of the law firm of Finches, Lynde & Muller, of the city of Milwaukee. I know M'r Watson, the witness just sworn on the part of the defendant. I had a

conversation with him concerning this policy of M'r Berton's, either at my office or at the Board of Trade in Milwaukee, soon after M'r Berton's death. M'r Watson said that he had always considered M'r Berton a good risk; that he had been hard up, but knew he would pay as soon as he could get round to it. M'r Watson said that M'r Berton owed him the money, and would pay as soon as he could.

Cross-examination:

Q. Did M'r Watson use the words "owed him" in any conversation had with him?

A. I can't swear to it.

C. H. ORTON.

My name is Charles H. Orton. I reside in the city of Milwaukee. My business is that of practicing physician and surgeon. I was examining physician for the defendant company in the city of Mil-
23 waukee in the years 1873 and 1874. M'r Watson was agent of that company, acting under M'r Reynolds. I take it he was the agent of the company, because his sign on a building he rented from me during that time was to that effect, and his printed form of letter-heads described him as such agent. I do not know as a fact that he was the agent of the company, but I know the company recognized his acts through M'r Reynolds.

Q. Please state, if you know, whether Mr. Reynolds or Mr. Wat- Watson, but particularly whether Mr. Reynolds, was in the habit of delivering policies without the first premium being paid?

(Objected to by def't's counsel as irrelevant, incompetent, and immaterial.)

A. I know he did occasionally—I mean Mr. Reynolds. He delivered a policy to a man named Case, who was working for me, without the first premium being paid. Mr. Watson, in my presence, called Mr. Reynolds' attention to this policy of Berton's, when Mr. Reynolds was here before Mr. Berton's death.

Mr. Watson stated that Mr. Berton had not paid his premium, and Mr. Reynolds said he presumed it would be all right. I do not remember that there was any positive instructions given by Mr. Reynolds to Mr. Watson at that time about the Berton policy—there may have been but I don't remember it. I had conversations with Mr. Watson at different times in relation to Mr. Berton's policy.

(Objected to.)

At the time that Mr. Berton was taken dangerously ill, Mr. Watson came into my office and asked me if he had better make an effort to collect the policy at that time. I said to him in justice to the company he had better not take the money while he was dangerously ill, and Mr. Watson concluded he had better not make any effort to collect the money. Mr. Watson stated to me, that Berton had not paid, and he did not like to press him, because he thought his influence would be advantageous to the company, in getting other policies. I wrote a letter to the defendant company, dated Milwaukee, June 27, 1874, and showed Mr. Watson the letter at the time it was written. (Copy of letter shown to wit-
24 ness.) This is a copy of the letter.

(Copy of letter filed and marked "Exhibit B," by notary.)

Cross-examination:

Mr. Reynolds tried to get me to help him collect the premium in the Case matter referred to. That is the way I know it was not paid at the time of the issuing of the policy. I have no recollection of any other

specific case in that company where Reynolds delivered a policy without the first premium being paid, but he did for other companies by whom he was employed. Reynolds was agent of two life companies at the same time. At any rate he acted for two companies at the same time.

Exhibit B, attached to deposition of C. H. Orton.

MILWAUKEE, *June 27th*, 1874.

UNION M. LIFE-INS. CO., *Boston:*

GENT: I write you in relation to the death of W'm S. Burton, thinking, perhaps, you are not fully aware of the facts in the case. Mr. Watson delivered the policy to Mr. Burton, as he occasionally does, and as Mr. Reynolds frequently did to parties whom they considered responsible without receiving the premium. Mr. Reynolds was here last March, and while settling with Mr. Watson, his attention was called to this case. He said to Mr. Watson he had no doubt but it would be all right and gave Mr. Watson no positive instructions in the matter. There was no time after the policy was delivered that the money could not have been collected, and after Mr. Burton was taken sick Mr. Watson consulted me in relation to collecting the money. I told him under the circumstances that it would be better for him not to do so, owing to the high reputation of Mr. Burton and the families to whom he is connected. There was very little or no effort made on the part of Mr. Watson to collect the premium. Mrs. Burton is a niece of Judge Miller, who is connected with the firm Finches, Lynde & Miller, who in point of wealth and ability, stand at the head of any law firm in our city, who have the matter in charge, and I believe it would be a very serious injury to your company to have the matter litigated, and I have no doubt you could at this time effect a compromise.

Yours, respect.,

(Signed) C. H. ORTON, *M. D.*

Defendant objected to the following parts of *of* the testimony of said witnesses, to wit: "M'r Watson stated that M'r Berton had not paid his premium, and M'r Reynolds said he presumed it would be all right. I do not remember that there was any positive instructions given by M'r Reynolds to M'r Watson at that time about the Berton policy. There may have been, but I don't remember it"; which objections were by the court overruled, to which ruling of the court defendant then and there excepted.

Plaintiff then read in evidence a letter of G. N. Reynolds to Finches, Lynde & Miller, of date April 25, 1874, which said letter is in words and figures as follows, to wit:

PHILADELPHIA, 4—25, 1874.

Messrs. FINCHES, LYNDE & MILLER,
Att'ys at Law, Milwaukee:

DEAR SIRS: Your favor, 21st, came to hand during my absence, and was answered by one of my clerks. By looking at our books, and upon accurate information sent us by M'r J. H. Watson, of your city, who was attending to this policy for us, I regret to have to inform you that M'r W'm S. Berton was not insured with my co., under pol. 45915, nor has he, to my knowledge, any insurance with my co. under any other pol. The facts of the case being that M'r Berton never paid a cent of premium

to this co., nor to M'r Watson to be transmitted to this co., or to myself, its agent.

The policy having been left in his hands, so I am informed, by M'r Watson, awaiting his (M'r B.'s) decision as to whether he (B.) could spare the money to pay the premium and would take the policy. As M'r B. did not accept the policy and pay the premium, therefore he was not insured with co. under the policy you name. I am sorry for
26 M'r's Berton if she expects to receive any money from my co., as if the premium had been paid and that the policy have been in force, I would have been most happy to assist her in making up proofs of loss and in being the means of communication between her and my co. in paying over to her the $5,000 which, had this pol. been in force, she would have rec'd.

Knowing you to be honorable men, I hope you will explain to M'r's B. the real facts in this case, which are as I state, and thus disabuse her mind of her evident expectation of realizing this $5,000.

I remain yours, resp'ly,

G. N. REYNOLDS,
Gen'l Ag't.

From what I have written, you can see that it is not necessary for you to send in any proofs of loss, as no loss to my co. has occurred.

This was all the evidence offered or introduced by plaintiff, and he thereupon rested his case.

Defendant then asked the court to instruct the jury that upon the pleadings and the evidence offered by plaintiff, plaintiff was not entitled to recover.

The court refused so to charge the jury, and defendant then and there excepted to the ruling of the court.

To maintain the issues on its part, defendant read in evidence the deposition of J. H. Watson, being in words and figures as follows, to wit:

J. H. WATSON.

My name is James H. Watson. I reside in Milwaukee County, Wisconsin, and I am forty-one years of age, and am agent of the Canada Southern Fast-Freight Line. In the year' 1873 and 1874, I was employed by the Star Union Fast-Freight Line. During these years I did some business in the way of life-insurance policies. I was employed by the general agent of the Union Life-Insurance Company, M'r Reynolds. His office was in Philadelphia. Milwaukee was in his general agency.

(Paper shown witness purporting to be an application by Will-
27 iam S. Berton to the Union Mutual Life-Insurance Company, for insurance on his own life, and marked as "Exhibit A," attached to these depositions.)

I saw William S. Burton sign the application purporting to be signed by his name, and those are his signatures. I forwarded those papers to Mr. G. N. Reynolds. I have received a policy of insurance from Mr. Reynolds for Mr. Burton. When I received the policy I took it to Mr. Burton's office, in the Chamber of Commerce building in Milwaukee. I told him I had brought his policy. I handed him the policy. He either took it or I laid it on the desk. There was very little said. He was busy at the time, and seemed to be reluctant about accepting the policy. I think he said he did not know how long I should have to wait. I said I guessed he would be good enough for that amount. I

don't think there was anything further said. I then left the office. That was all the conversation that took place at that time. I never had any further conversation with him about the policy, and never asked him for any settlement until after the visit of Mr. Reynolds to Milwaukee, in March, 1874. I met Mr. Burton on the street at that time, and told him that the general agent had been here, and also what the general agent had said with regard to his policy. I told him that the general agent had said that if he should happen to die, that policy in his hands unpaid might be bad or awkward. I forget the exact words I used. He laughed at the idea of his dying. What he said was to the effect that I would have to wait some time.

Q. Did he say what you would have to wait for?

A. No; he did not.

Q. Prior to the visit of the general agent to Milwaukee, had you acquainted him, the general agent, with the fact that Mr. Burton had the policy in his possession?

A. I had not.

Q. State the conversation between yourself and the general
28 agent at that visit.

A. Mr. Reynolds called upon me at my office, in March, 1874, at any rate shortly before Mr. Burton's death. I called his attention to the fact that Mr. Burton had possession of his policy and had made no payment, but that I thought that he was a good risk—was having rather bad luck in his business about that time, but I thought he would pay up when he got on his feet again. Mr. Reynolds told me that in case Mr. Burton should die without paying it would an awkward thing. He gave me no directions at that time as to what I was to do with Mr. Benton's policy. Mr. Reynolds never instructed me before Mr. Burton's death to take the policy from him. Mr. Reynolds gave me no directions to say anything to Mr. Burton about it. I never related any portion of this conversation with Mr. Reynolds, except what I have already stated. Mr. Burton never offered to pay me any money on that policy. No one else did until after his death.

Cross-examination:

(Counsel shows to witness a sheet of paper purporting to be a leaf from the register of applications, taken by J. H. Watson, the witness, of Milwaukee.)

I was special agent of Mr. Reynolds for the taking of applications for policies of insurance in the defendant company. I attended to the business of the defendant company in Milwaukee and vicinity for Mr. Reynolds. I sent on in the years 1873 and 1874, to Mr. Reynolds, a number of applications for policies in the defendant company. The policies were returned in every case where the applications were accepted. Mr. Reynolds was at that time a resident of Philadelphia, and had no office in Milwaukee. There was no other person that I am aware of had charge of the defendant company's business at that time in Milwaukee but myself. I did not demand the premium from Mr. Burton at the time I delivered to him the policy. I did not understand at the time of the application by Mr. Burton that he was to pay
29 the premium upon delivery of the policy.

Q. Was it understood at the time you delivered the policy to M'r Burton that you should wait on him for the premium?

(Objected to by defendant's counsel as incompetent and irrelevant, and as calling for the witness' opinion, and not for a statement of facts.)

A. There was no understanding to that effect. What I mean is, that

that there was no time set for the payment then. As an actual fact, I did wait upon him for the premium. He stated then that I would have to wait some time for the premium. I voluntarily gave him the policy. I never demanded payment of the money from M'r Burton before his death. I did not think the money could be got from M'r Burton at any time by pressing him. If I thought he was able to pay at any time I should have asked him for it.

Q. Is the paper that has already been shown you, purporting to be a list of applications to defendant company, in your own handwriting?

A. Yes, sir.

Q. Is it a leaf from your register kept by you as representative of the defendant company in Milwaukee, in 1873 and 1874?

(Objected to by defendant's counsel as assuming a fact not proved.)

A. It is.

Q. Please state whether as agent of the company you had a register of applications.

(Objected to for the same reason as last above.)

A. Yes, sir. The leaves of the register that I had been writing in have all been cut out of the book by me, and the book is used for another purpose. I only brought in the leaf containing those dates in regard to Burton's policy; the rest are at home. M'r Reynolds furnished me with the book. These memoranda were made at the time the several applications, risks, &c., mentioned therein were made.

30 Redirect examination:

Q. Was the book referred to one given to you for the purpose of making returns to the company or to M'r Reynolds, or was it merely for your private use in keeping track of the business?

(Objected to by plaintiff's counsel as being a mere matter of opinion of the witness.)

A. It was merely for my private use. The book was never returned to M'r Reynolds or the company.

Q. Was D'r Charles H. Orton present at the interview you have related between yourself and M'r Reynolds?

A. Not to my recollection.

Q. At that interview, did M'r Reynolds use the language litterally or in substance as follows, "I presume it will be all right," with reference to the Berton policy?

A. No; he did not.

Defendant also read in evidence the following testimony of plaintiff, as per stipulation, in words and figures as follows, to wit:

MARTROM D. LEWIS, ADM.,
v.
UNION MUTUAL LIFE INS. CO.

For the purpose of the trial of the above-entitled cause, it is admitted by the parties hereto that Martrom D. Lewis would swear to the following facts, and they shall be taken as his testimony in the cause, to wit:

That said Lewis took charge of said estate for the sole purpose of administering upon and collecting the policy in suit, and that there are no other assets in this State belonging to the deceased Berton's estate; that Lewis never made any proofs of loss to the defendant, and never notified defendant that he had administered on the estate, and never noti-

fied defendant that he had any claim under said policy except by the institution of this suit.

W'M S. BODLEY,
Att'y for Pl'ff.

31 EVERETT W. PATTISON,
Att'y for Def't.

Defendant then read in evidence the proofs of loss furnished by the special administrator of William S. Berton, at Milwaukee, Wisconsin, being in words and figures as follows, to wit:

Notice and proof of claim.

A.

UNION MUTUAL LIFE INSURANCE CO.

Claimant's statement.

Policy No. 45915.] [Am't insured, $5,000

(In cases where the following forms do not apply, or fail to give such information as shall be satisfactory, the company will require such other information as will enable it to judge of the identity of the person, the justness of the claim, etc.)

Notice is hereby given the Union Mutual Life Insurance Company, that William S. Berton, of Milwaukee, county of Milwaukee, State of Wisconsin, has deceased; that said William S. Berton was the same person insured by said Union Mutual Life Insurance Company in the sum of five thousand dollars, for the term of his life, by their policy of insurance No. 45915, dated July 30, 1873, and that under the terms and conditions of said policy, the same becomes payable to Benjamin K. Miller, special administrator of the estate of said William S. Berton, as the lawful owner and holder of said policy; and he hereby declares that his interest in said policy is to the full amount of said sum of $5,000, and do further declare that the statements in the annexed certificates A, B, C, and D are correct.

In proof of said death, and my claim under the before-mentioned policy, I answer as follows:

1. *a.* Names of claimant in full.—*a.* Benjamin K. Miller, special administrator.

c. Residence of claimant.—*c.* Milwaukee, Wisconsin.

2. Name of deceased.—William S. Berton. Residence, Milwaukee, Wisconsin.

3. Occupation at date of insurance.—Commission merchant.

4. Occupation since the insurance was effected.—Commission merchant.

32 Place of birth—date of birth.—Unknown to me.

6. Place of death.—Milwaukee, Wisconsin. Date of death—March 31, 1874.

7. How long have you been acquainted with the deceased?—About 8 years.

8. State all the facts regarding cause of death.—He was taken ill a few days before his death. D'r Thorndike was called, & died on the day above named.

9. How long has he been sick?—About six days.

10. Has the said deceased, since the date of the application for the above-mentioned policy, resided away from Milwaukee? If so, when, and for what period, and at what place? Or has he at any time visited any portion of the country beyond the limits prescribed in the policy, or made any voyage to sea? If so, when and where? State these particulars fully.—No.

11. Has the deceased at any time been engaged in any military or naval service; or been engaged as principal or otherwise in a duel?—Not to my knowledge.

12. Refer to the said policy of insurance in question and state whether to your knowledge or belief the insured has complied with all the conditions contained therein?—I do not know.

Having been duly sworn I hereby depose and say, the answers to the above questions are true, and the statements therein contained true and full to the best of my knowledge and belief.

Witness my hand this 12th day of June, 1874.

B. K. MILLER.

STATE OF WISCONSIN,
County of Milwaukee, ss:

On this 12th day of June, 1874, personally appeared before me the above named Benjamin K. Miller to me known, and made oath that the foregoing statements by him are true and full, to the best of his knowledge, recollection, and belief.

WILLIAM H. MORRIS,
Notary Public Milwaukee, Wis.

33 B.

Attending physician's statement in proof of death of William S. Berton.

1. Name of deceased, residence, occupation.—William S. Berton, Milwaukee, Wis., commission merchant.

2. How long have you been acquainted with deceased?—About 7 years.

3. Were you his attending physician before his last sickness? If so, how long and for what disease did you prescribe, or were consulted?—I was his attending physician. He was ill only eight days before his death.

4. Were you his attending physician during his last sickness, and up to the time of death?—Yes.

5. Date of your first visit.—March 25, 1874.

6. Date of your last visit.—March 31, 1874.

7. Date of death.—March 31, 1874.

8. State the disease, or the cause, or the manner of death, and such medical facts as are connected with the case. Give full and detailed statement.—Was consulted by William S. Berton, of Milwaukee, March 25, 1874. Found him suffering with acute pain in left breast; dry cough; difficulty of breathing; face was flushed; tongue furred; pulse quick & hard. Learned that he had headache daily for a week & slight chill a day or two before I saw him. On examination found dullness over middle portion of left chest; crepitation was audible in front & side. No improvement the next day; brain become disturbed; low delirium came on; the case assumed a typhoid form, & on the 31st of March he died of typhoid pneumonia.

9. State whether, in your opinion, the disease or death was superinduced by intemperance of any kind.—Not to my knowledge.

Having been duly sworn, I hereby depose and say that the statements in the foregoing answers are true and full, to the best of my knowledge and belief; and that there are no material facts in the case which are not disclosed.

Dated at Milwaukee this 12th day of June, 1874.

WILLIAM THORNDIKE,
Attending Physician.

34 STATE OF WISCONSIN,
County of Milwaukee, ss:

On this 12th day of June, 1874, personally came before me, the above-named William Thorndike, to me known as a physician in regular standing, who, being by me duly sworn, deposed that the answers to the above questions are full and true, to the best of his knowledge, information, and belief.

WILLIAM H. MORRIS,
Notary Public, Milwaukee, Wisconsin.

C.

Statement of the undertaker in proof of the death of William S. Berton.

1. Name of deceased.—William S. Berton. Residence and occupation. Milwaukee; commission merchant.
2. Did you see the body of William S. Berton, and do you know that it was the body of the person described in the accompanying statement of the claimant in this case?—I did, and know it was the body of the person described.
3. Age of deceased.—About 38 years.
4. Place and date of death.—Milwaukee, March 31, 1874.
5. Place and date of interment.—Forest Hill cemetery, Milwaukee, April 4, 1874.

Having been duly sworn, I hereby depose and make oath that the answers to the foregoing questions are true, to the best of his knowledge and belief.

Dated at Milwaukee this 9th day of June, 1874.

ROBERT W. PATTERSON.

STATE OF WISCONSIN,
County of Milwaukee, ss:

On this ninth day of June, 1874, personally appeared before me the above-named Robert W. Patterson, to me known, and made oath that the foregoing statements are true and full, to the best of his knowledge and belief.

WILLIAM H. MORRIS,
Notary Public, Milwaukee Co., Wisconsin.

D.

Statement of an acquaintance in proof of the death of William S. Berton.

35 1. How long have you known William S. Berton?—About 5 years.
2. Place of birth.—Frederickton, New Brunswick.
3. Place and date of death.—Milwaukee; March 31, 1874.
4. Have you seen the remains or body of the person deceased; and

is it, to your knowledge, the same person described in the above-name' policy of insurance?—Yes; & I knew it to be the body of William S. Berton.

5. State all the facts within your knowledge relating to the cause of death.—We knew he was sick, & died in about a week of typhoid pneumonia.

6. Name and residence of the attending physician.—D'r William Thorndike; Milwaukee.

7. Have his habits of life been correct and temperate?—So far as I know, his habits have been correct & temperate.

8. Is there any circumstance within your knowledge, information, or belief, or have any facts come to your knowledge, inconsistent with the statements made by the claimant's physician and undertaker in this case? If so, state them fully.—I know none.

9. Has the deceased, within your knowledge, violated any of the conditions of said policy of insurance?—Not to my knowledge.

Having been duly sworn, we hereby depose and say that the answers to the above questions are true and full, to the best of our knowledge and belief. Dated at Milwaukee this 11th day of June, 1874.

A. G. MILLER.
G. W. AMBRIDGE.

STATE OF WISCONSIN,
County of Milwaukee:

On this eleventh day of June, 1874, personally appeared before me the above-named A. G. Miller & G. W. Ambridge, to me known, who, being by me duly sworn, deposed that the answers to the above questions are full and true, to the best of their knowledge, information, and belief.

WILLIAM H. MORRIS,
Notary Public, Milwaukee Co., Wisconsin.

36 STATE OF WISCONSIN,
Circuit Court, Milwaukee County, ss:

I, Patrick Connelly, j'r, clerk of said court, do hereby certify that William H. Morris, esq., whose name appears above, and before whom the foregoing affidavit was made, was, at the date thereof, a notary public, duly appointed, &c., residing in the county of Milwaukee, duly qualified and empowered by the laws of said State to administer oaths, take acknowledgement of deeds and other instruments in writing, and exercise all other such powers and duties as by the laws of nations and according to commercial usage may be exercised and performed by notaries public, and that full faith and credit are due and should be given to his official acts as such notary, and that said instrument is executed and acknowledge' according to the laws of this State; that I am well acquainted with the handwriting of said notary, and verily believe the signature thereto, purporting to be his, is genuine, and that the seal thereto attached is a correct impression of his official seal.

In testimony whereof I have hereunto set my hand and affixed the seal of said court this 13th day of June, A. D. 1874.

[SEAL.] PATRICK CONNELLY, J'R, *Clerk*,
By R. W. KASSON, *Deputy Clerk.*

THE STATE OF WISCONSIN,
Milwaukee County, ss:

The State of Wisconsin to Benjamin K. Miller, greeting:

Whereas William S. Berton, late of Milwaukee, Wisconsin, as is alleged, died intestate, having while living, and at the time of his death, goods, chattels, and estate within this county, by means whereof the granting administration of all and singular the goods, chattels, credits, and estate, and also the auditing, allowing, and final discharging of the account whereof doth belong to us; and whereas it doth appear to the satisfaction of the court that it is necessary to appoint a special administrator to act in collecting and taking charge of the estate of said deceased:

Therefore, we do grant unto you, the said Benjamin K. Miller,
37 as special administrator of the estate of said deceased, full power by these presents to ask, demand, recover, and receive the debts which were due unto said deceased, while living, and at the time of his death did properly belong, and to commence and maintain suits as an administrator, and may sell such perishable & other personal estate as said court may order to be sold; hereby requiring you to make or cause to be made a full, true, and perfect inventory of all and singular the goods, chattels, credits, and estate of said deceased which have or shall come to your hands, possession, or knowledge, and the same so made to exhibit or cause to be exhibited unto our county judge and judge of probate for the county aforesaid, on or before the first day of August, A. D. 1874, and also to render a just and true account of your administration at or before the expiration of one year from the date hereof, to obey all orders and decrees of the court, and also to render a just and true account of your administration when thereunto lawfully required.

In testimony whereof, we have caused the seal of our county court for the county of Milwaukee & State of Wisconsin to be hereunto affixed.

Witness Hon. J. E. Mann, judge of the county court of said county, this 5th day of June, A. D. 1874.

[SEAL.] J. E. MANN, *County Judge.*

County court in probate.

THE UNITED STATES OF AMERICA,
State of Wisconsin, Milwaukee County, ss:

I, J. E. Mann, county judge for said Milwaukee County, and sole presiding judge of the county court for said county, do hereby certify that I have compared the annexed and foregoing copy with the original letters of special administration in the matter of the estate of William S. Berton, deceased, now on file and of record in the office of the said court (said court being the probate court for said county,) and that the same is a true, perfect, and complete copy thereof, and of the whole thereof,
38 and that said Benjamin K. Miller therein mentioned was appointed special administrator in pursuance of and agreeably to the law of said State of Wisconsin.

I further certify that there is no clerk of said county court in so far as it is a court exercising probate jurisdiction, but that the files and records thereof are in my exclusive custody and possession as such judge. I further certify that this attestation is in due form of law and by the proper officer.

In witness whereof I have hereunto set my hand and affixed the seal

of the county court of said Milwaukee County, at the city of Milwaukee, this 12th day of June, 1874.

[SEAL.] J. E. MANN, *County Judge.*

Defendant also read in evidence the agreement contained in the application of said Berton to defendant and signed by said Berton, being as follows:

"And I further agree that the assurance shall not be binding until the first installment of premium shall have been paid to said company or an accredited agent thereof, during the life and good health of the party whose life is proposed for insurance."

Thereupon the court, among other things, charged the jury as follows, to wit:

Charge.

The jury are instructed that if an action can be maintained against defendant at all under the policy sued on, plaintiff is entitled to maintain the action.

To which portion of the charge of the court defendant at the time objected, and said objection being by the court overruled, defendant then and there excepted to that portion of said charge. And the court further charged the jury, that if the agent of defendant delivered the policy to William S. Berton with the understanding or agreement that he would wait for the first premium, or if he gave him credit for the first premium, then defendant is liable on the policy and plaintiff is entitled to recover.

39 To the giving of this portion of the charge to the jury defendant at the time objected, and such objection being overruled, defendant then and there excepted to such ruling, and to said portion of the charge of the court. Defendant asked the court to charge the jury as follows:

If the jury believe that the life of the said William S. Berton was insured by the defendant, and that the policy sued on was delivered to him in Milwaukee, in the State of Wisconsin; that said Berton died in Milwaukee; that after his death the policy sued on was sent to S't Louis, and was taken in charge by the public administrator of S't Louis County; that said Benton had no estate or property in S't Louis County at the time of his death; that proof of loss was made to defendant by one Miller, who was appointed administrator in the said State of Wisconsin, and that said Miller claimed that said amount was payable to him by the terms of the policy, and that plaintiff never made any claim or furnished any proof of loss to defendant, they will find for defendant."

The court refused to charge as above requested by defendant, and to this action and ruling of the court defendant at the time excepted.

The jury thereupon rendered a verdict for the plaintiff, and assessed his damages at the sum of five thousand five hundred and one dollars.

And thereafter, in due time, defendant filed its motion for a new trial, being in words and figures as follows to wit:

Motion for new trial.

In the circuit court of the United States, eastern district of Missouri.

MARTROM D. LEWIS, PUB. ADM'R IN CHARGE OF estate of W'm S. Berton,
vs.
UNION MUTUAL LIFE INSURANCE COMPANY.

Now this day comes the defendant, and moves the court to set aside the verdict, and grant it a new trial in the above-entitled cause, for the following reasons, to wit:

40 1. The verdict in said cause is against the evidence, against the weight of evidence, and against the law under the evidence.

2. The court erred in admitting improper and illegal evidence offered by the plaintiff, against the objection of defendant.

3. The court erred in its charge to the jury, giving them therein erroneous and improper instructions as to the law of the case.

4. The court erroniously and improperly refused certain requests to charge the jury made by the defendant.

5. The court erred in that portion of its charge, in which it instructed the jury, that if there could be any recovery under the policy at all, plaintiff was entitled to recover.

6. The court erred in that portion of its charge in which it instructed the jury that if the agent of the company delivered the policy to the assured with an agreement to wait upon him for the premium, then the condition of the policy as to the prepayment of the premium was waived.

7. The verdict should have been for the defendant instead of for the plaintiff.

EVERETT W. PATTISON,
Att'y for Defendant.

Which said motion coming on to be heard, was by the court overruled, to which action and ruling of the court, defendant at the time excepted.

And thereafter in due time, defendant filed its motion in arrest of judgment, which said motion is in words and figures as follows, to wit:

Motion in arrest.

In circuit court of United States, eastern district of Missouri.

MARTROM D. LEWIS, PUB. ADM'R IN CHARGE of estate of William S. Berton,
vs.
UNION MUTUAL LIFE INSURANCE COMPANY.

Now this day comes the defendant in the above-entitled cause, and moves the court to arrest the judgment in said cause, for the following reasons, to wit:

41 1. The plaintiff, as appears from the pleadings in the case, had no lawful right to take charge of the estate of said Berton.

2. As appears on the face of the pleadings, the plaintiff has not legal capacity to sue.

3. On all the pleadings it appears that plaintiff has no cause of action.

4. Defendant in its answer sets up a complete defense to the cause of

action stated in plaintiff's petition, which defense is admitted by plaintiff's reply.

EVERETT W. PATTISON,
For Def't.

Which said motion coming on to be heard, was by the court overruled, to which action and ruling of the court, defendant, at the time, excepted.

And that the above matters, things, motions, rulings, and exceptions may be made a part of the record, defendant hereby tenders this its bill of exceptions, and prays that the same may be signed and sealed as such, which is accordingly done.

[SEAL.] SAMUEL TREAT.

And afterwards, to wit, at an adjourned day of said September term, 1876, of said court, the following further proceedings were had in said cause on the 12th day of January, 1877, to wit:

M. D. LEWIS, PUBLIC ADM'R, &C., PLAINTIFF,
vs.
UNION MUTUAL LIFE-INSURANCE CO., DEFENDANT.

Now comes the defendant by its attorney, and presents to the court a writ of error to remove this cause to the Supreme Court of the United States, and a citation, citing and admonishing the said plaintiff to be and appear at a Supreme Court of the United States on the second Monday of October next, which said writ of error is allowed, and said citation signed by the judge; and the defendant also presents to the court a bond in the sum of eight thousand dollars, which said bond is approved and ordered to be filed, and now on motion of said at-
42 torney it is ordered that a supersedeas be granted staying further proceedings on the judgment herein.

Which said bond is in words and figures as follows, to wit:

Bond.

Know all men by these presents, that we, The Union Mutual Life-Insurance Company, as principal, and Henry W. Hough, as surety, are held and firmly bound unto Martrom D. Lewis, public administator of S't Louis County, Missouri, in charge of the estate of William S. Berton, deceased, in the full and just sum of eight thousand dollars, to be paid to the said Martrom D. Lewis, or his successor in said office of administrator aforesaid, heirs, executors, administrators, or assigns; to which payment well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals, and dated this 12th day of January, in the year of our Lord one thousand eight hundred and seventy-seven.

Whereas, lately, at the September term, A. D. 1876, of the circuit court of the United States for the eastern district of Missouri, in a suit depending in said court, between Martrom D. Lewis, public administrator of S't Louis County, Missouri, in charge of the estate of William S. Berton, deceased, plaintiff, and The Union Mutual Life-Insurance Company, defendant, judgment was rendered against the said defendant, and the said defendant having obtained a writ of error of the said court to reverse the judgment in the aforesaid suit, and a citation di-

ected to the said Martrom D. Lewis, public administrator of S't Louis County, Missouri, citing and admonishing him to be and appear at a Supreme Court of the United States to be holden at Washington the second Monday of October next:

Now the condition of the above obligation is such, that if the said The Union Mutual Life-Insurance Company shall prosecute said writ to effect, and answer all damages if it fail to make good its plea, then the above obligation to be void, else to remain in full force
43, 44 and virtue.

[CORP. SEAL.] UNION MUTUAL LIFE-INS. COMPANY,
[SEAL.] By JOHN E. DE WITT,
President.

[SEAL.] HENRY W. HOUGH.

Approved by—

SAMUEL TREAT, *Judge.*

45 UNITED STATES OF AMERICA,
Eastern District of Missouri, ss:

I, M. M. Price, clerk of the circuit court of the United States in and for the eastern district of Missouri, do hereby certify the writing hereto attached to be a true and complete transcript of the record and proceedings had in case No. of Martrom D. Lewis, public administrator of S't Louis County, Missouri, in charge of the estate of William S. Berton, deceased, plaintiff, against The Union Mutual Life-Insurance Company of Maine, defendant, as fully as the same remain on file and of record in said case, in my office.

In witness whereof I hereunto subscribe my name and affix the seal of said court, at office in the city of S't Louis, in said district, this 14th day of February, in the year of our Lord eighteen hundred and seventy-seven.

[SEAL.] M. M. PRICE,
Clerk of said Court,
By A. P. SELBY,
Deputy.

(Indorsement on cover:) No. 374. The Union Mutual Life-Insurance Company of Maine, plaintiff in error, vs. Martrom D. Lewis, public administrator, &c., of the estate of William S. Berton, dec'd. E. Missouri C. C. U. S. Filed 16th May, 1877.

Filed and case submitted under the 30th rule, on printed stipulation on file

Everett Pattison

Atty for Plff in Error

IN THE

Supreme Court of the United States.

No. 374.

THE UNION MUTUAL LIFE INSURANCE COMPANY OF MAINE,
Plaintiff in Error,

vs.

MARTROM D. LEWIS, PUBLIC ADMINISTRATOR IN CHARGE OF ESTATE OF WM. S. BERTON, DECEASED,
Defendant in Error.

In Error to the Circuit Court of the United States for the Eastern District of Missouri.

STATEMENT, ASSIGNMENT OF ERRORS, AND BRIEF OF PLAINTIFF IN ERROR.

EVERETT W. PATTISON,
Of Counsel for Plaintiff in Error.

Levison & Blythe, Prs. St. Louis.

IN THE

Supreme Court of United States.

THE UNION MUTUAL LIFE INSURANCE COMPANY OF MAINE,

Plaintiff in Error,

vs.

MARTROM D. LEWIS, PUBLIC ADMINISTRATOR IN CHARGE OF ESTATE OF WM. S. BERTON, DECEASED,

Defendant in Error.

In Error to the Circuit Court of the United States for the Eastern District of Missouri.

STATEMENT, ASSIGNMENT OF ERRORS, AND BRIEF OF PLAINTIFF IN ERROR.

STATEMENT.

This was an action commenced by the defendant in error against the plaintiff in error on a policy of insurance alleged to have been issued on the life of William S. Berton, of Milwaukee, Wisconsin, in the sum of five thousand dollars. The suit was commenced in the State Court, being the Circuit Court of St. Louis County, and was removed by the plaintiff in error to the United States Circuit Court for the Eastern District of Missouri. The petition alleges that plaintiff below was, on the 7th of December, 1874, appointed by the

Governor of Missouri public administrator of St. Louis county, and that he duly qualified as such; that on the 17th of September, 1875, he, as such public administrator, took charge of the estate of William S. Berton, deceased; that defendant below was a corporation under the laws of Maine and doing business in the State of Missouri in conformity to the laws of said State; that on the 30th of July, 1873, defendant below, for a valuable consideration paid to it by William S. Berton, made a policy of insurance in writing (which policy was filed with the petition), and thereby insured the life of said William S. Berton in the sum of five thousand dollars; that on the 31st of March, 1874, during the continuance of said policy and risk, said Berton died; that said Berton and said plaintiff below each duly fulfilled all the conditions of said insurance on his part; that said defendant below has and still doth wilfully, vexatiously and maliciously refuses to pay said insurance; that no part of said sum of five thousand dollars has been paid, and the said sum is now due from defendant to plaintiff as administrator aforesaid. (Printed Record, pp. 2, 3)

To this petition plaintiff in error, under the rules of the Circuit Court for Missouri, in due time filed its answer (Printed Record, pp. 8–10), denying that plaintiff below lawfully took charge of the estate of William S. Berton at any time. The answer then makes the following affirmative allegations, to-wit: That William S. Berton did not die in St. Louis county, and was not living in said county, nor in the State of Missouri at the time of his death, or at any time prior thereto, and that he did not leave any money, property, papers or other estate in said county, or in said State, and that plaintiff below was never ordered by the Probate Court of St. Louis county, or by any other court whatever, to take charge of said Berton's estate, and that said Berton has not now, and never has had, any estate in said county of which plaintiff could take possession, and that he was not authorized to take possession of said Berton's estate.

The answer further contained a denial that defendant below made its policy of insurance, insuring the life of said Berton in any sum whatever, or that said Berton ever paid it any consideration whatever, valuable or otherwise, for any policy whatever, or that Berton or plaintiff below ever fulfilled any conditions of insurance. Defendant below also denied any knowledge or information as to the death of said Berton, and denied that any money was due plaintiff below.

It also alleged that plaintiff below never gave it, or offered to give it, any notice or proofs of said Berton's death, and never made any claim that defendant below owed him any sum whatever on account of insurance on the life of said Berton, and never offered it any proof of his claim to recover any sum from it on account of said Berton.

The answer sets up the following further affirmative defense: (Printed Record, p. 9) That on the 24th of July, 1873, one William S. Berton, of Milwaukee, Wisconsin, applied to the defendant below for insurance upon his life in the sum of five thousand dollars; that thereupon defendant below executed a policy for said sum, agreeing to pay said sum to the executors, administrators or assigns of said Berton in three months after due notice and satisfactory proof of the death of said Berton, and of the just claim of said Berton or any other person as executor, etc., of said Berton under it, "provided the sum of one hundred and thirty-seven 60 100 dollars had been first received by the defendant or its accredited agent during the lifetime and good health of said Berton, and not otherwise;" that the policy also contained the following clause: "But the same shall not be binding until delivered and the advance premium is paid;" that the application made by Berton was the basis upon which the policy was executed, and that it contained among other agreements the following, which was duly signed by said Berton, and formed a part of the consideration of the policy: "And I further agree that the assurance shall not be binding until the first installment of premium shall have been paid to said company or an accredited agent thereof during the life and good health of the party whose life is proposed for insurance."

The answer then alleges that said policy was never delivered to said Berton; that the first premium was never paid; that if Berton ever came into possession of the policy such possession was wrongful and without right, and Berton never acquired any rights thereunder; that defendant below never was legally bound by said policy, and that neither Berton nor his representatives had any claim thereunder. To the new matter in this answer plaintiff below filed a replication (Printed Record, pp. 10–11), alleging that he had "no knowledge or information thereof sufficient to form a belief as to what the contents of the application pleaded by defendant are, and prays that as against this plaintiff they may be proved."

Plaintiff below in further replication denied that defendant below never delivered said policy to Berton, and that said Berton came into possession of said policy wrongfully and without authority, and that Berton never acquired any rights under said policy; and further "denies all knowledge or information thereof sufficient to form a belief whether said sum of one hundred and thirty-seven 60-100 dollars, being the amount due as first premium thereon, was never paid to defendant or any of its agents by Berton, or any one for him."

The remainder of the replication is as follows: "And for a further reply, plaintiff says that if said first premium of one hundred and thirty-seven 60-100 dollars on said policy was not paid before its delivery, as the defendant has in its answer alleged, then the said policy of insurance was delivered by said defendant to said Berton by and through its duly authorized agent or agents, said agent or agents having delivered said policy and allowed credit to said Berton for the payment of said first premium of one hundred and thirty seven 60-100 dollars; that there was no time from the delivery of said policy to the death of said Berton that the said sum could not have been collected from said Berton, had said agent or agents made application for the payment of the same; that said sum of one hundred and thirty-seven 60-100 dollars has been offered to said company upon its refusal to pay the amount due on account of the non-payment, as it stated, of said sum or premium as before stated. That due notice and proof of death of said Berton was within a reasonable time after his death offered to said defendant and was refused by it, on the ground that said defendant never had a risk on his, said Berton's life."

At the time these pleadings were filed, there was a rule of Court being one of the rules of the Circuit Court of the United States for the Districts of Missouri, adopted June 29th, 1871, which reads as follows:

"Rule 35. Every material allegation of the petition not controverted by the answer, and every material allegation of new matter contained in the answer not controverted by the reply, shall, for the purposes of the action, be taken as true; but the allegations of new matter in the reply shall be deemed controverted by the adverse party as upon a direct denial or avoidance."

Upon the issues as thus made up, the parties went to trial. Plaintiff below introduced in evidence the policy (Printed Record, p. 12), which contained, among others, the following provisions: "This policy of insurance witnesseth that whereas, William S. Berton, of Milwaukee, county of Milwaukee, State of Wisconsin, has applied to the Union Mutual Life Insurance Company by his application, dated July 24, 1873, for insurance on the life of himself * * * * * * and has also agreed to pay the sum of one hundred and thirty-seven dollars and sixty cents as the annual premium therefor, on or before the 30th day of July in every year during the continuance of the policy, and now, the first payment of the above-mentioned annual premium having first been received by the company or their accredited agent during the life time and good health of the said insured, as is hereinafter provided, and not otherwise, and in consideration of such payment having been so received, * * * * * * * * * * the said company do hereby insure the life of William S. Berton aforesaid, in the amount of five thousand dollars." (Printed Record, pp. 3 and 4.)

Also the following: "And the said company do hereby promise to and agree with the said assured, his executors, etc., well and truly to pay the sum insured to the said assured, his executors, etc., *three months* after due notice and satisfactory proof of the death of the said insured, and of the just claim of the assured, or of any other person, as executor, administrator, guardian or assign of the assured under it." (Printed Record, p. 4.)

Also the following: "In witness whereof, the said Union Mutual Life Insurance Company have, by their president and secretary, signed this contract, at their office in Boston, this 30th day of July, 1873; but the same shall not be binding until delivered, and the advance premium is paid." (Printed Record, p. 4.)

Also the following: "The application herefor shall form and be a part of this policy." (Printed Record, p 5.)

Also the following: "No agent of this company, except the president or secretary, shall waive or alter any condition expressed in this policy, or in any note, check or draft given to or accepted by the company in settlement of any premium or parts of premium for this policy." (Printed Record, p. 5.)

The same witness testified that *there was no understanding* to the effect that he should wait on Berton for the premium, He says: "What I mean is, that there was no time set for the payment then. As an actual fact, I did wait upon him for the premium. He stated then that I would have to wait some time for the premium. I voluntarily gave him the policy. I never demanded payment of the money from Mr. Berton before his death. I did not think the money could be got from Mr. Berton at any time by pressing him. If I thought he was able to pay it any time, I should have asked him for it." (Printed Record, pp. 17, 18.)

There is no evidence to show that Watson, on any other occasion, delivered a policy without collecting the premium, or even that any one who was directly an agent of the company ever did it, except, perhaps, Reynolds did in one instance, and it is not shown that the company ever had knowledge of that.

Defendant's testimony further showed that Benjamin K. Miller, of Milwaukee, Wisconsin, was, by the Judge of the County Court of the county in which said city is situated, on the 5th day of June, 1874, duly appointed special administrator of the estate of Berton; that as such administrator he made proofs of loss to plaintiff, and claimed that the amount of the policy should be paid to him. (Printed Record, pp. 19–23.)

The proofs of loss were introduced in evidence, and showed that Berton died in Milwaukee, on the 31st day of March, and that he was living in said city at the time the application for the policy was made, and at the time Watson delivered it to him. (Printed Record, pp. 19–22.)

Defendant's testimony also showed that Berton signed the following agreement, contained in the application for the insurance, to wit:— "And I further agree that the insurance shall not be binding until the first installment of premium shall have been paid to said company, or an accredited agent thereof, during the life and good health of the party whose life is proposed for insurance." (Printed Record, p. 24.)

This was all the evidence in the case. The Court then, against the objection of the defendant below, charged the jury as follows: "The jury are instructed that if an action can be maintained against defendant at all, under the policy sued on, plaintiff is entitled to maintain the action."

To which charge the defendant below duly excepted. (Printed Record, p. 24.)

The Court also charged the jury as follows, against the objection of defendant below: "If the agent of defendant delivered the policy to William S. Berton, with the understanding or agreement that he would wait for the first premium, or if he gave him credit for the first premium, then defendant is liable on the policy, and plaintiff is entitled to recover." To which charge defendant below duly excepted. (Printed Record, p. 24.)

The jury rendered a verdict in favor of plaintiff below, and assessed his damages at the sum of five thousand five hundred and one (5501) dollars In due time thereafter, defendant below filed its motion for a new trial, on the grounds that the verdict was against the evidence, against the weight of evidence, and against the law under the evidence; that the Court admitted improper and illegal evidence offered by the plaintiff below; that the Court erred in its charge to the jury, and that the Court erroneously and improperly refused the request of defendant below to charge the jury, and that the Court erred in that portion of its charge in which it instructed the jury that if there could be any recovery at all under the policy, plaintiff was entitled to recover, and that if the agent of the company delivered the policy to the assured, with an agreement to wait upon him for the premium, then the condition of the policy as to the prepayment of premium was waived; and further that the verdict should have been for the defendant instead of for the plaintiff.

This motion was by the Court overruled, and defendant below duly excepted. (Printed Record, p. 25.)

Thereupon defendant below filed its motion in arrest of judgment on the following grounds: That it appeared from the pleadings in the case that plaintiff below had no lawful right to take charge of the estate of said Berton; that it appeared from the face of the pleadings, that plaintiff had no legal capacity to sue; that it appeared from the pleadings that plaintiff had no cause of action; that defendant in its answer set up a complete defence to the cause of action stated in plaintiff's petition, which defence was admitted by plaintiff's reply. (Printed Record, pp. 25, 26.)

This motion was also overruled by the Court, and defendant below duly excepted.

Defendant below then sued out its writ of error to this Court, and now assigns the following errors in the action of the Court below.

ASSIGNMENT OF ERRORS.

I. The Court below erred in overruling the motion in arrest of judgment made by defendant below. (Printed Record, p. 25.)

II. The Court below erred in admitting the paper introduced by the defendant below, and called a "Certified Copy of the Letters of Administration of Plaintiff." (Printed Record, pp. 12, 13)

III. The Court below erred in refusing the instruction asked by plaintiff below, at the close of plaintiff's case, that upon the pleadings and the evidence offered by plaintiff, plaintiff was not entitled to recover. (Printed Record, p. 16.)

IV. The Court below erred in charging the jury that if an action can be maintained against plaintiff at all, under the policy sued on, plaintiff is entitled to maintain the action. (Printed Record, p. 24)

V. The Court below erred in charging the jury that if the agent of defendant delivered the policy to William S. Berton, with the understanding or agreement that he would wait for the first premium, or if he gave him credit for the first premium, then defendant is liable on the policy, and plaintiff is entitled to recover. (Printed Record, p. 24.)

VI. The Court below erred in overruling the motion for a new trial, made by defendant below. (Printed Record, p. 25.)

BRIEF OF PLAINTIFF IN ERROR.

I. The public administrator of St. Louis county had no authority to take charge of this estate, and his act in taking charge thereof is a mere nullity.

The Statute of Missouri on this point is as follows:

"It shall be the duty of the public administrator to take into his charge and custody the estates of all deceased persons in his county in the following instances: *First*, when a stranger dies intestate in the county, without relations, or dies leaving a will, and the executor named is absent, or fails to qualify; *Second*, when persons die intestate, without any known heirs; *Third*, when persons unknown die, or are found dead, in the county; *Fourth*, when money, property, papers, or other estate are left in a situation exposed to loss or damage, and no other person administers on the same; *Fifth*, when any estate of any person who dies intestate therein or elsewhere, is left in the county liable to be injured, wasted or lost, when said intestate does not leave a known husband, widow, or heir in this State; *Sixth*, when, from any good cause, said Court shall order him to take possession of any estate to prevent its being injured, wasted, purloined or lost."

Session Acts of Missouri, 1868, p. 3; 1 Wagner's Statutes, (Ed. 1872), p. 122, § 8.

Now, it appears from the admissions of the pleadings and from the evidence in this case, that none of the facts existed which under the statute are required to authorize the public administrator to take charge of this estate. *First.* William S. Berton did not die in St. Louis county. *Second.* He did not die intestate without known heirs. *Third.* He was not found dead in the county. *Fourth.* No money, property, papers or other estate were left by the deceased in the county in a situation exposed to loss or damage. The policy was in proper custody in Wisconsin, where the estate had already been administered on, and was sent here for the express purpose of having this suit brought in a State distant from the home office of the company. *Fifth.* The Court did not order the public administrator to take charge of the estate.

Defendant in error relies on a decision of the Supreme Court of Missouri to sustain his right to administer. The case referred to is that of *Wetzell* vs. *Waters*, 18 Mo. 396, in which the Court says: "A public administrator is regarded like any other administrator in bringing suits. He need not show that the facts exist which authorize him to take on himself the burden of administration. None but an executor, or a legally appointed administrator, can dispute his authority, except in cases in which the same thing might be done in relation to private administrators."—p. 399.

It will be observed that this was a case where a judgment by default had been rendered against the plaintiff in error, which he was seeking to set aside in the Supreme Court. As one ground of reversal, he insisted that the petition was insufficient, because it did not contain an allegation that the plaintiff was public administrator, and because it did not set out the existence of the contingencies authorizing him, as public administrator, to take charge of the estate. The Court merely held that it was not necessary for him to allege them, and as a necessary consequence he need not prove them. But it does not say that the defendant will not be permitted to show that none of these contingencies had arisen. On the contrary, the implication is clear that such a defence would be admissible. It is certain that the public administrator derives his authority to act solely from the law. If the facts are lacking, upon the existence of which the authority depends, there can be no authority.

In the case of *Lancaster* vs. *Washington Life Insurance Company*, (62 Mo. 121), the Supreme Court of Missouri says: "The grant of letters being established, we must presume that they conformed to the requirements of the statute, and recited both the death of Touhey and his residence in St. Louis county. *This is sufficient to throw the burden of proof* on the defendant to show that the letters to plaintiff were illegally issued."—p. 127. That burden of proof we have taken in this case, and have shown by the admissions in the pleadings and by the evidence, that there was nothing for the public administrator to act on, and that his notice was consequently a nullity.

The only other case decided in Missouri which seems to touch this question is that of *Johnson* vs. *Beazley*, (65 Mo. 250). All that the Court decides in that case is, that where the Probate Court has actually appointed an administrator. its action cannot be reviewed or

attacked collaterally. But in the case now before the Court, the Probate Court took no action. We are not seeking to attack collaterally what any court has done—whether a court of general or limited jurisdiction, for there was no action of the Court in the matter. That this case in the 65th Mo. is not an authority against us is apparent when the reasoning of the Court is considered, and especially upon an examination of the authorities cited by Judge Henry.

In the case of *Griffith* vs. *Frazier*, 8 Cranch, 9, Ch. J. Marshall says: "To give the ordinary jurisdiction, a case in which by law letters of administration may issue must be brought before him." If such is not the case it is not within his jurisdiction. "It was not one in which he had a right to deliberate. It was not committed to him by the law."—p 23.

Where "he can have no jurisdiction his act is in itself an absolute nullity."—p. 26.

"If in no possible state of things he could grant such administration, it would be difficult to conceive how he can have jurisdiction." —p. 26.

That is just what we urge here. Every fact and contingency was lacking which would authorize the public administrator to take charge of Berton's estate. And this is what we understand to be the decision of the Missouri Court in the case of *Lancaster* vs. *Washington Ins. Co.*, *ubi supra*.

In the case of *McNitt* vs. *Turner*, 16 Wall. 352, the only point decided is, that as it does not appear whether Williams was or not public administrator, or whether there was any public administrator in Adams county, the Court will not presume that the Probate Court committed error. And in that case too there was action by the Court—the Court, by act of record, granted the letters.

So in the case of *Grignon* vs. *Astor*, 2 How. 319, this Court held only that as the Probate Court had decided that the facts were before it conferring the jurisdiction, the action of that Court in assuming jurisdiction would not be reviewed.

To the same effect is the decision in the case of *Wright* vs. *Wallbaum*, 39 Ill. 554.

But Mrs. Berton had no interest in nor any claim under this policy. Where parties rely upon a refusal to pay as constituting a waiver of the condition as to proof of notice of death and claim under the policy, they must show a refusal to pay to some one authorized to demand payment. A refusal to pay to a mere stranger is not sufficient. Nor would the statement of an agent of the company to a stranger to the contract that the policy never took effect, or that the company did not consider itself bound by the policy, affect the status of the parties to the contract. The only refusal to pay addressed to any one claiming a right to recover on the policy is contained in the answer filed in this case, and that answer gives as one ground of its refusal to pay, the want of notice and proofs.

If the letter referred to a policy in which Mrs. Berton was interested, then the policy in suit was not the one. If it referred to the policy in suit, then Mrs. Berton was as much a stranger to it as any of the jurors who tried the case. There is not a scintilla of evidence that the company ever refused to pay this policy to the Wisconsin administrator.

Then the defendant below introduced evidence showing that the allegations of the reply were untrue. Proofs of loss were furnished by the Wisconsin administrator, and it appears from them that he was the only one who had any just claim under the policy. If such "just claim" was afterwards transferred to another, was not such other bound to give the company the required notice of his just claim? And had he a right to sue until three months had expired after giving such notice? There can be but one genuine claimant. If plaintiff was that one, there was no compliance on his part with this condition of the policy, and he has shown no waiver of it.

And, as a necessary consequence, plaintiff below, even if entitled to sue at all, brought his action prematurely.

For the reasons thus far given, the Court erred in refusing the instruction asked at the close of the case of plaintiff below, that on the evidence offered by him he was not entitled to recover.

III. Did the policy ever take effect?

The evidence is conclusive that no part of the first premium was ever paid. The evidence adduced by plaintiff below established this fact. This was a condition precedent. Was this condition ever waived by the company? There is no pretense that the officers of the company, or any one at the home office of the company, knew anything about the delivery of the policy. The Court below, however, charged the jury that "if the agent of the defendant delivered the policy to William S. Berton with the understanding or agreement that he" (the agent) "would wait for the first premium, or if *he* gave him credit for the first premium, then defendant is liable."

By this charge the Court assumed that the agent had the authority to give credit, and that his waiting for the premium was equivalent to the company's waiting for it.

We insist that, 1st, The question of the agents authority was one for the jury and not for the Court.

2d. That there was in this case no evidence of such authority to go to the jury.

1. If there was any evidence of the authority of the agent to waive a condition of the policy, the question whether it was sufficient to prove such authority was one for the jury.

Insurance Company vs. *Norton*, 96 U. S. 234.

It is true the question of the authority of the agent so far as it depended upon the written instrument (the policy) was for the Court; but the question whether the company had so acted as to give the agent an authority not contained in the written instrument, was for the jury.

McMorris vs. *Simpson*, 21 Wend. 610.
Loudon vs. *Hagerstown Bank*, 36 Pa. St. 498.
Nicoll vs. *Amer. Ins. Co.*, 3 Woodb. & Min. 529.
Hawkins vs. *Lombard*, 25 Ill. 572.

2. There was no evidence in this case that the agent had such authority, and hence there was no evidence of waiver, and the question of waiver should not have been submitted to the jury at all.

In this policy we find the following conditions and stipulations:

First. The application contained a stipulation, signed by the insured as follows:

"I further agree that the insurance shall not be binding until the first installment of premium shall have been paid to said company * * * * during the life * * * * * of the party whose life is proposed for insurance." And the application containing this agreement is, by the terms of the policy, made a part of the policy.

Second. The policy contains no acknowledgment of the receipt of the premium, or any part of it.

Third. By the very terms of the policy the company insures the life, *if* the first premium has been paid, "during the lifetime and good health of the insured, *and not otherwise.*"

Fourth. The policy contains the further express condition: "But the same shall not be binding until delivered *and the advance premium is paid.*"

Fifth. The policy contains the further express condition, that "no agent of this company, except the president or secretary, shall waive or alter any condition expressed in this policy."

And the evidence shows the additional facts that—

Sixth. This policy was delivered, not by a general agent, not even by an agent of the company at all, but by one employed by one of the company's agents as a sub-agent, responsible only to him and not known to the company.

Seventh. There is no evidence that this sub-agent, ever before or since, delivered a policy without collecting a premium. And it is not shown that a general agent ever did it, except in one case, and knowledge of that is not brought home to the company.

The provisions and stipulations above quoted make a contract as strong as it is possible to express in words; and if, notwithstanding the language used, a mere sub-agent can by his acts fix on a company a liability in favor of an insured person which both the company and the insured person had in the most solemn manner and by express terms agreed should not be fixed upon it, there is no use in ever attempting to make such a contract.

And no Court has yet gone the length of holding the company liable under such a state of facts. This a careful examination of the adjudicated cases will show.

(*a*). Examining, first, the case of *Miller* vs. *Life Insurance Company*, 12 Wall. 285, we find that the policy in that case contained an acknowledgment of the receipt of the first premium, reading as follows: "In consideration of the representations and agreements contained in the application therefor, and of the sum of two hundred and fifty-four ($254) dollars and eighty-five (85) cents *to them in hand paid, etc.*" How far that influenced the decision of the Court does not appear from the opinion rendered, as the Court declined under the course pursued in that case, to review the facts. But that it was an important circumstance in the case is evident from the language of Mr. Justice Clifford, on page 296, where he says: "The policy recites that the plaintiff paid that sum to the defendants in hand."

And in the face of such an admission the company, it would seem, should be estopped to deny the receipt, if the purpose of the denial was to show that there was no contract; though the authorities are not uniform on this point.

And the agents, too, gave a receipt for the premiums, (p. 288).

Again, in this case in the 12th Wallace premium notes were given in part payment of the premium—one for six months and one for twelve months, and neither of them were due at the time the death of the insured occurred. And on this fact the Court lays stress. (See p. 303, at foot of page).

Furthermore, the waiver in this case under consideration was made by the *general agents* of the company, and in the language of the Court: "Evidence of the most convincing character is reported, showing that it was the custom of the agents to give credit in certain cases to persons with whom they were well acquainted, and knew to be responsible, and not to call for the money at the time the policy was delivered; and one of the instructions given to such agents affords a strong presumption that the custom *was known to the company.*"—(p. 303).

The point as to the power of agents to waive the condition was urged in that case. But the Court met it by saying that "the decisive answer to that suggestion in this case is, that the policy, when properly construed, *does not contain any absolute condition* that it shall *not attach* or be operative *unless the cash premium is first paid by the insured.*"—(p. 304). This is true; and as the application was not by the terms of that policy made a part thereof, the agreement in the application was not a part of the policy.

Thus the case of *Miller* vs. *Insurance Company* is wanting in all of the seven features mentioned, and which belong to the case at bar. And, while considering that case, we call attention to the fact that no exceptions to rulings were saved, and that the Supreme Court passed only upon the question whether the facts found by the Court would support the judgment.

One further remark of the Court in that case should be adverted to for the purpose of showing its inapplicability to the case at bar, defendant below being a mutual company. It is said, (p. 303): "Where the policy is delivered without requiring payment, the presumption is, *especially if it be a stock company*, a credit was intended."

In the case of *Sheldon* vs. *Connecticut Mutual Life Insurance Company*, (25 Conn. 207), the waiver was held good. But the policy does not appear to have contained the provisions found in our policy. It is true the application contained an agreement that the assurance should not be binding till the first premium was paid, and that such agreement was signed by the applicant. But in that case the application was not made a part of the policy, and hence was not embraced in the ultimate contract. (See opinion of Court, p. 220.) In the case at bar the application is made a part of the policy.

In the case of *Miss. Valley Life Ins. Co.* vs. *Neyland*, (9 Bush, 431), neither the policy nor the application contained the stipulations or conditions above referred to.

In the case of *Currier* vs. *Continental Life Insurance Co.*, (53 N. H. 538), there was abundant evidence of ratification of the agent's acts by the company.

In the case of *Boehen* vs. *Insurance Co.*, (35 N. Y. 131), the certificate of renewal was made out in the company's office and there delivered to the plaintiffs.

The case of *Wood* vs. *Insurance Company*, (32 N. Y. 619), only decides that a general agent may waive the condition as to prepayment of the premium. But in that case the policy contained no provision limiting the powers of the agent. And the same is true of the policy in the case of *Bodine* vs. *Insurance Company*, (51 N. Y. 117).

In *Viele* vs. *Germania Insurance Co.*, (26 Iowa, 9), the local agent, by whom the waiver was made, had practically the powers of a general agent, and much more extensive power than the general agents of life insurance companies ever possess; and in that case, too, the policy contained no restriction on his powers.

In *Insurance Company* vs. *Norton*, (96 U. S. 234), there was evidence that the agent had been in the habit of extending the time of payment and of waiving forfeitures. (See statement of evidence on page 236, and opinion of the Court on page 240).

The Court say, speaking of the conditions of the policy: "These terms, had the company so chosen, it could have insisted on."—p. 240.

In the case at bar, there is not the slightest evidence that the company did not insist on them. See also dissenting opinion, p. 244.

(*b.*) On the other hand, a case was decided in 1873, by the Supreme Court of Ohio, in which the plaintiff in error was the same as in the case now before this Court, and in which the Ohio Court construed the same policy that is now before this Court. See *Union Mutual Life Ins. Co.* vs. *McMillen*, 24 Ohio St. 67.

In that case the party who attempted to make the waiver was the agent of the company (p. 71), and not, as in the case at bar, a simple sub-agent of the company's agent. The Court held that there was no authority to waive the conditions of the policy, and that there was no waiver in fact. The language of the Court on that point is so fully applicable to the present case that we quote it entire.

"It is delared in the policy that no agent of the company, except the president or secretary, can exercise such authority. Nevertheless, it was competent for the company to invest Durkee or any other of its subordinate agents, with like authority, if it saw fit to do so.

"But the authority must exist before effect can be given to the act of the agent varying an express condition of the policy after it has once taken effect."

A fortiori, an agent cannot alter a condition so as to make the contract take effect.

"The authority may be express or it may be implied from the previous dealings between the company and its agent, or from other cir-

cumstances. But in whatever form its existence is asserted, the burden of proving it is on the party claiming the benefit of its exercise.

"The evidence as to the mode of doing business between the company and the agent is limited to what appears in the statement. Nor is there any evidence showing the system or method adopted by the company for conducting its business from which the authority claimed for the agent can be inferred. And after careful consideration of all the evidence in the case, we are unable to discover any sufficient ground to warrant the conclusion that the agent was authorized to extend the time of payment or to bind the company by waiving the default."—(p. 81.)

And the same question of the power of the agent of this very company is passed upon and decided in favor of plaintiff in error in the case of *Insurance Company* vs. *Mowry*, 96 U. S. 544, 548.

And the Court says, in *Insurance Company* vs. *Eggleston* (id. 572), referring to the Mowry case: "The representations, declarations or acts of an agent, contrary to the terms of the policy, of course, will not be sufficient, *unless sanctioned by the company itself.*"

And the same view is taken and fully recognized by the Court in *Insurance Company* vs. *Wolff*, 95 U. S. 326, 331.

It is true, it is said in *Insurance Company* vs. *Wilkinson*, 13 Wall, 235, that "the powers of the agent are *prima facie* co-extensive with the business entrusted to his care, and will not be narrowed by limitations *not communicated to the person with whom he deals.*" But here the limitations on the authority of the agent *were* communicated to Berton, for it is conclusively presumed that he knew the terms of the policy.

Rice vs. *Dwight Manufacturing Co.*, 2 Cush. 80.
Grace vs. *Adams*, 100 Mass. 505.

So, too, it is held in *Hambleton* vs. *Insurance Company*, 6 Biss. 91, that an insurance solicitor has no authority, simply from the nature of his business, to bind the company to a waiver of a payment of the premium.

The position of Parsons in that case was quite similar to that of Watson, the sub-agent, in the case at bar.

And to same effect as to power of sub-agent to bind the company

by waiver, see *Markey* vs. *Mutual Benefit Life Ins. Co.*, 103 Mass. 78, 92.

And we have the high authority of Judge Sharswood to the same effect

Lefavour vs. *Insurance Company*, 1 Phil. 558.

See also decision by the English Court of Exchequer, in the case of *Acey* vs. *Fernie*, 7 Mees. and Wels. 151.

See, also, *Continental Life Insurance Co.* vs. *Willetts*, 24 Mich. 268; Judge Cooley delivering the opinion of the Court; and *Busby* vs. *North Amer. Life Ins. Co.*, 40 Md. 583.

In *Bouton* vs. *American Mutual Life Insurance Co.*, 25 Conn. 554, the Court says: "It surely is not necessary to cite books to show that an agent authorized only to execute a contract in behalf of one of its parties has no power to vary it, or dispense with its execution by the other; or that one authorized by a person to receive a payment of a sum of money from another, on and pursuant to a conditional contract which requires such payment to be made at a specified time, is thereby empowered or authorized to waive a breach of such condition."

And the Court further says: "The policy expressly says that it shall not be binding 'until the advance premium is paid.' The whole authority of the agent being here expressed on the face of the instrument, there is no place for the doctrine which is applicable to cases where an agent with an ostensible general authority is restricted by particular and special private instructions from his principal." —(p. 555.)

In the Connecticut case, as in the case at bar, the only evidence of the authority of the agent was contained in the policy itself, and the Court held that there was no authority shown.

Compare the charge of the Court in the case cited with that in the case at bar.

See, also, as to authority of agent, *Markey* vs. *Insurance Company*, 103 Mass. 87, where the Court says: "The authority of Wells may be still further restricted by the known fact that he was only a sub-agent, employed to receive applications for insurance and forward them to the company, and to deliver the policies issued by the com-

pany, and collect premiums thereon. It is not within the apparent scope of the employment of such an agent to make contracts or declarations to bind the company generally; and therefore we think the defendant may show the actual extent and limit of his authority." —(p. 93.)

In a case similar to the one at bar, recently tried before Judge Shipman, in the Second Circuit, it was held that the agent had no authority to waive the pre-payment of the premium, and that his attempted waiver was ineffectual.

Davis vs. *Mass. Mutual Life Ins. Co.*, 13 Blatch. 462.

See, also, *Lee* vs: *Guardian Life Insurance Co.*, 5 Bigelow, 18; *Hardie* vs. *St. Louis Mutual Life Insurance Co.*, 26 La. Ann. 242.

In the case of *Castoir* vs. *American Life Insurance Company*, 33 N. J. 487, the policy contained a restriction on the power of the agent, and it was held that he could not make a contract or waive a forfeiture for the company.

The same principle is recognized by the Supreme Court of Missouri. In *Wheeler* vs. *Givan*, 65 Mo. 89, 90, the Court say: "The defendant, dealing as he was with an agent of limited power, knowledge of which was imparted to him by the recitals on the margin of the note, could not bind the principal by making a contract beyond the authority of the agent."

Thus it will be seen that in no adjudicated case did the policy contain the stipulations and provisions found in the one now before the Court, or else there was evidence of ratification not found in this case. And many of the cases above cited are authorities directly to the point that in the case at bar there was no evidence of authority, and none of waiver.

One other feature of this case we have thus far left untouched, but it has a very important bearing on the question of the delivery of the policy; and yet the attention of the jury was in no way directed to it. The plaintiff below introduced a letter in evidence from one who signed himself General Agent of the Company; though there is no evidence that his duties were other than that of soliciting insurance,

which was, in fact, his sole duty. By this letter it appears that the policy was left in the hands of Mr. Berton, "awaiting his decision as to whether he could spare the money to pay the premium, and would take the policy." (Printed Record, p. 16.) If this were the object of delivering the policy, the contract certainly never took effect—was never completed.

See, among other cases on this point, *Myers* vs. *Insurance Company*, 27 Pa. St. 268.

Thus the plaintiff's own testimony tends to show this fact, and defendant below was entitled to have this feature of the case presented to the jury.

For the foregoing reasons, we think the Court below committed the six errors assigned, and that plaintiff in error is entitled to a reversal of the judgment.

EVERETT W. PATTISON,
Attorney for Plaintiff in Error.

IN THE

Supreme Court of the United States.

No. 374.

THE UNION MUTUAL LIFE INSURANCE COMPANY OF MAINE,

Plaintiff in Error,

vs.

MARTROM D. LEWIS, Public Administrator in Charge of Estate of Wm. S. Berton, Deceased,

Defendant in Error.

REPLY TO BRIEF OF DEFENDANT IN ERROR.

EVERETT W. PATTISON,
Of Counsel for Plaintiff in Error.

LEVISON & BLYTHE, PRS. ST. LOUIS.

In the Supreme Court of the United States.

THE UNION MUTUAL LIFE INSURANCE COMPANY OF MAINE,

Plaintiff in Error,

vs.

MARTROM D. LEWIS, PUBLIC ADMINISTRATOR IN CHARGE OF ESTATE OF WM. S. BERTON, DECEASED,

Defendant in Error.

REPLY TO BRIEF OF DEFENDANT IN ERROR.

I. In reference to the point made by defendant in error, that the first defence made by the defendant below was in the nature of a plea in abatement, and should have been determined before the trial (Brief of defendant in error, p. 5), we say:

1. That the practice in the United States courts in Missouri has been assimilated to that in the State courts; and in the State courts all these matters of defence, no matter what their nature, are embodied in one pleading called an answer, and all are heard and determined together.

2. We do not think this is a matter which is waived unless plead in abatement, and that is the position we have taken in our original brief. We do not deny that plaintiff is public administrator, but simply that, *as such*, no case had arisen which authorized him to interfere with Berton's estate; that his act in

doing so was a mere nullity; that all of his acts were without authority. It is just such a case as that commented upon by Chief Justice Marshall in *Griffith* vs. *Frazier* (8 Cranch, 9).

II. The statement made by Mr. Bliss, and cited by counsel on page 8 of his brief (*Bliss on Life Ins.*, § 296), is not borne out by the cases cited by the learned author. The cases all apply to fire insurance companies, and the facts in all of them differed widely from those in the case at bar (see our original brief, p. 20).

And the same remarks apply to the citation from May on Insurance, which will be found on page 9 of defendant in error's brief.

The quotation from the case of *Sheldon* vs. *Insurance Company* (25 Conn. 207), which appears at the foot of page 8 of counsel's brief, we have been unable to find in the case itself. That case we have reviewed in our original brief, and will not notice it further, except to say that there was no evidence whatever in the case at bar of an agreement between the applicant and Watson "that the latter should be responsible to the company for the amount, and hold the applicant as his personal debtor therefor."

We believe all the other points made by defendant in error are fully covered by our original brief, and therefore respectfully submit the case.

EVERETT W. PATTISON,

Attorney for plaintiff in error.

IN THE SUPREME COURT OF THE UNITED STATES.

THE UNION MUTUAL LIFE INSURANCE COMPANY OF MAINE,
Plaintiff in Error,

vs.

MARTROM D. LEWIS, Public Administrator in Charge of the Estate of Wm. S. Berton, Deceased,
Defendant in Error.

No. 374.

STATEMENT AND BRIEF OF DEFENDANT IN ERROR.

J. D. S. Dryden,
Wm. S. Bodley.
Of Counsel for Defendant in Error.

Maynard & Tedford, Printers 207 N. Third Street, St Louis, Mo.

Second.—Certified copy of his letters of administration. (Printed record, p. 12.)

Third.—The depositions of A. J. Cooper and of Dr. C. H. Orton (the medical examiner of the plaintiff in error), which showed, or at least tended to show, that Wm. S. Berton died some time in March, 1874, in the city of Milwaukee; that after Berton's death the policy sued on was found in his desk; that one Watson was agent in Milwaukee of the plaintiff in error, under Mr. Reynolds, and that the company recognized his acts as such agent; that said Watson, as such agent, delivered the policy to deceased, on or about July 30th, 1873, and allowed the same to remain in possession of deceased till March, 1874, nearly a year after its date, and that Mr. Reynolds, the general agent of the company, at Philadelphia, was familiar with the fact of its delivery and possession. (Printed record, pages 13 14 and 15.)

Fourth.—To sustain waiver of proofs of loss, a letter from G. N. Reynolds denying liability of defendant company, stating that it was not necessary to send any proofs of loss, as no loss had occurred to his company. (Printed record, pages 13 and 14.)

The defendant company, to sustain issues on its part, offered the following evidence:

First.—Deposition of J. H. Watson, which showed: That deponant was employed by the general agent of the defendant company, Mr. Reynolds, whose office was in Philadelphia; that he took the application of Wm. S. Berton for insurance; that he received policy of insurance from Mr. Reynolds for Mr. Berton. "When I received the policy, I took it to Mr. Berton's office, in the Chamber of Commerce building in Milwaukee. I told him I had brought him his policy. I handed him the policy. He either took it or I laid it on the desk. There was very little said. He was busy at the time, and seemed reluctant about accepting the policy. I think he said he did not know how long I would have to wait. I said I guessed he would be good enough for that amount" "That was all the conversation that took place at that time." That he had no further conversation with Mr. Berton till in March, 1874; that he then met Mr. Ber

ton on the street, and told him that the *general agent* had said that if he should happen to die, that policy in his hands, unpaid, might be bad. I forget the exact words used. He laughed at the idea of his dying. "What he said was to the effect that I would have to wait some time." That in a conversation in March, 1874, shortly before Mr. Berton's death, he called Mr. Reynolds' attention to the fact that Mr. Berton had possession of *his* policy, and had made no payment, but that he thought he "was a good risk—was having rather bad luck in his business about that time, but I thought he *would pay up* when he got on his feet again." Mr. Reynolds gave me no directions at that time as to what I was to do with *Mr. Burton's* policy. "Mr. Reynolds *never instructed me before Mr. Burton's death to take the policy from him. Mr. Reynolds gave me no directions to say anything to Mr. Burton about it.*" Mr. Berton never offered to pay any money on that policy. No one else did *until after his death.* (Printed record, page 17.)

IN CROSS-EXAMINATION.

Watson testified he was special agent of Mr. Reynolds for the taking of applications for policies of insurance in the defendant company; that he attended to the business of the defendant company in Milwaukee and vicinity for Mr. Reynolds. *Mr. Reynolds was at that time a resident of Philadelphia, and had no office in Milwaukee. There was no other person that he was aware of, that had charge of defendant company's business at that time in Milwaukee, but deponent; he did not demand the premium from Mr. Berton at the time he delivered him the policy*; that he did not understand, at the time of the application by Mr. Berton, that he was to pay the premium upon delivery of the policy; that there was no understanding to the effect that he should wait on him for the premium, at the time of the delivery of the policy. "*What I mean is that there was no time set for the payment then. As an actual fact, I did not wait upon him for the premium. He stated then that I would have to wait some time for the premium. I voluntarily gave him the policy.*

I never demanded payment of the money from Mr. Burton before his death." (Printed record, pages 17 and 18.)

Second.—Evidence of plaintiff below under stipulation. (Printed record, page 18.)

Third.—Proofs of loss furnished by special administrator at Milwaukee, Wis. (Printed record, page 19.)

Fourth.—Parts of application for insurance. (Printed record, page 24.)

Plaintiff below had verdict and judgment for five thousand, five hundred and one dollars (printed record, page 11), said sum being amount of said policy, with interest on same from three months after death of assured to time of rendition of verdict, less $137.60, amount of premium with interest on same from the time it ought to have been paid.

BRIEF OF DEFENDANT IN ERROR.

I.

The authority of the plaintiff below—as public administrator in charge of estate of Wm. S. Berton, deceased,—can not be questioned as shown by the record in the case at bar.

1*a*. Because the authority of an administrator cannot be questioned in a collateral proceeding.

1853. Wetzell v. Waters, 18 Mo. 396.

1856, Riley's Adm. v. McCord's Adm., 24 Mo. 267.

1877. Lancaster, Adm., v. Washington Life Ins. Co. of New York, 62 Mo. 121.

1877. Johnson *et. als.* v. Beazley, 65 Mo. 250.

Whatever may be the decisions in other states, the rule is well settled in Missouri. The question was thoroughly discussed and examined in Johnson *et. als.* v. Beazley, above cited, and the law settled, as far as this state is concerned. We would call this Honorable Court's attention particularly to the cases cited by Judge Henry, and also to the fact that all the cases cited by counsel for plaintiff in error in his brief were before the court in that case.

"A public administrator is regarded like any other administrator in bringing suit. He need not state that the facts exist which *authorize him to take on himself* the burden of administration. None but *an executor* or *legally appointed administrator* can dispute his authority, except in cases in which the same thing might be done in relation to private administrators."

Wetzell v. Waters, (18 Mo. 399), before cited.

In the case of Lancaster, Adm., v. Washington Insurance Co. (62 Mo. 121), the court held: "The grant of letters being established, we must presume *that* they *conformed to the requirements of the statute* and recited both the death of Touhey and his residence in St. Louis."

The sentence which follows, viz., "This is sufficient to throw the burden of proof on the defendant to show the letters to plaintiff were illegally issued," and upon which counsel for plaintiff in error would seem to rely with great stress, will, we are sure, appear to this court to refer more particularly to the *prima facie* evidence of the death of the deceased on an examination of the full facts in that case; p. 127, 128. Moreover this matter is firmly settled in Johnson *et als.* v. Beazley, *supra*.

2*a*. The attempted defence of want of authority of the plaintiff below was interposed too late.

Conrad v. Atlantic Ins. Co. of N. Y., 1 Peters 386.
De Shobry v. Nicholson, 3 Wallace 420.

The learned counsel for plaintiff in error appeared in the state court and had the case removed into the federal court, appeared in the federal court and filed an answer denying all liability under the policy. He took no steps to have the first of his answers, which, to say the least, was in the *nature of a plea in abatement*, determined before the trial. This, we submit, was a waiver of any right, if such a right he ever had, to object to the *want of capacity* of the plaintiff below to sue. We consider it more than useless to cite authorities to support such elementary propositions of law as *that matters in abatement must be disposed of at a preliminary stage of proceedings*, or *that a plea to the merits waives a plea in abatement*.

II.

That proof of loss ~~were~~ not waived by plaintiff in error.

1*a*. By a refusal of the company to pay the amount of the policy on other grounds.

Bliss on Life Insurance, p. 423, sec. 263, and cases there cited in note 2.

Dean Ætna Life Ins. Co., 5, Biglow Ins. Rep. p. 377.

2*a*. By denying all responsibility and refusing to pay anything when sued on the policy.

1874. McComas v. Covenant Mut. Life Ins. Co. of St. Louis, 56 Mo. 573.

"As the defendant denied all responsibility and refused to pay anything, this amounted to a waiver of notice and proof of death, and therefore the sum assured was due sixty days after the death of plaintiff's husband."

The evidence shows a refusal of payment by G. M. Reynolds, general agent of the defendant company (printed record, p. 15) on the ground that "Mr. Wm. S. Berton was not issued with my co. under pol. 45,915," (see number of policy sued on, printed record, page 3); "nor has he to my knowledge any insurance with my co under any other pol;" and further; "From what I have written you can see that it is not necessary for you to send any proofs of loss, as no loss to my co. has occurred."

Dean v. Ætna Life Ins. Co. *supra*.

And the pleadings filed, as well as the statement made by plaintiff in error in his brief, admit that the company *denied all responsibility under and refused to pay the amount of the policy*.

III.

Did the policy sued on ever take effect? We claim that it did for the following reasons:

First.—There was a *delivery of the policy*. There can be no controversy under the evidence that the policy in suit was delivered to the assured by one J. H. Watson, who was

acting as the agent of the company at Milwaukee, and that the same was found in the possession of assured at the time of his death, *nearly a year after its delivery* (printed record, pp. 13, 14); and that G. W. Reynolds, general agent of the company at Philadelphia, was fully cognizant of its delivery and possession (printed record, p. 17). And it is a fair presumption, which the court and jury may have drawn, that the company and its officers knew of such delivery and possession from the fact that the policy remained in the hands of the assured from July, 1873, until March, 1874, without question or inquiry on the part of the home office, and there is no evidence on the part of the company to rebut that presumtion.

2. There was a legal waiver of the condition of prepayment of the first premium.

Sheldon v. Connecticut Mut. Life Ins. Co. 25 Conn. 207.

Braydon v. Appleton Mut. Ins. Co., 42 Me. 259.

Bodine v. Exch. Fire Ins. Co., N. Y. Com. of App., 2 Ins. L. J. 23.

Bouton v. Amer. Mut. Life Ins. Co., 25 Conn. 542 (1 Beglow Ins. Rep. 51).

Holdsdon v. Guardian Life Ins. Co., 97 Mass. 144 (1 Biglow Ins. R. 218).

Wood v. Poughkeepsie Ins. Co., 32 N. Y. 619.

Boehen v. Williamsburg Ins. Co., 35 N. Y. 131.

Miller v. Brooklyn Life Ins. Co., 12 Wall. (U. S.) 288.

Sheldon v. Atlantic Fire & Marine Ins. Co., 26 N. Y. 460.

Heaton v. Manhattan Life Ins. Co., 7 R. I. 502; Goit v. Nat. Prot. Ins. Co. 25 Barb. (N. Y.) 189; Post v. Ætna Ins. Co., 43 Barb. 351.

1875. Dean v. Ætna Life Ins. Co., 5 Biglow Ins. Rep. 377.

Ins. Co. v. Wolff, 5 Otto, (95 U. S.) 326.

May on Insurance, page 433, sec. 360.

Bliss on Life Insurance, page 464, sec. 296.

1*a*. The agent had power to waive such a condition.

"There is a distinction between the powers of an agent after a policy has been issued and before. He may well be held to have authority to bind the company in connection with matters transpiring before or *at the time of the issue of the policy* and relating to it, but after the policy has been issued, his powers as a general thing are so far as that policy is concerned, exhausted, unless he has the right to make a new contract. An agent, *without authority to contract has authority to waive payment of thepremium and to deliver the policy giving a credit for the amount, though the policy provides that no policy shall be binding till the premium is paid, and this even though the policy also provides that the agent has no power to waive any condition in it.* Bliss on Life Insurance, page 464, sec. 296, and cases cited in note 2.

From the above and the cases there cited, the court will plainly perceive that there is a marked distinction made by all the authorities on life insurance and in decided cases as to an agent's power in *delivering a policy* and *waiving the first payment* and his waiving a condition of the policy as to *subsequent payments.* We call the court's attention to this for the reason that in nearly if not all the cases cited by the learned counsel of the plaintiff in error, the question involved related to *subsequent annual payments* after the policy had by its terms lapsed. Especially was this the case in the Union Mutual Life Ins. Co. v. McMillen, 24 Ohio, 67 (4 Biglow Ins. Rep. 384), and the condition No. 1 (Printed Record, page 4), upon which plaintiff in error so frantically relies, by its terms shows that it applies to annual premiums only.

"And if the agent be authorized to receive the premium, an agreement between the applicant and the agent that the latter will be responsible to the company for the amount and hold the applicant as his personal debtor therefor, is a waiver of the stipulation in the policy that it shall not be binding till the premium is received by the company for the amount or its accredited agent. Sheldon v. Connecticut Mut. Life Ins. Co., 25 Conn. 207. (1 Biglow Ins. Rep. 27.)

And in fact the *delivery of the policy wi*
the payment, raises the presumption that a credit is intended and is a *waiver of the condition of prepayment.* May on Insurance, page 434, section 360, and cases cited in note 1.

"And the waiver may be inferred from a variety of circumstances; in fact from any circumstance from which the jury may fairly infer that the insurers did not intend to insist upon the prepayment of the premium as a condition precedent. May on Insurance, page 434, sec. 300.

There can be no doubt from the evidence in the present case that Watson delivered the policy to the deceased. All the facts and circumstances of the case, as well as his declarations to third persons, and even his own evidence, plainly show that he intended waiting on Berton for the first premium. Reynolds, the general agent, was cognizant of the delivery to and possession in Berton, and yet gave no instructions to Watson to demand its return and the company by its action, after not receiving the premium for nearly a year and instituting no enquiry *or demanding the return of the policy*, thereby sanctioned and ratified the action of Watson in delivering the policy and waiving the prepayment of the premium.

2*a*. In answer to plaintiff in error's argument, if maintainable, of which we have serious doubt, that the question of Watson's authority was one for the jury and not for the court, we say there was no controversy as to the fact as to Watson's relation to the company. The evidence both of plaintiff and defendant below showed plainly that Watson was the acting agent of the company at Milwaukee, under Reynolds, the general agent; that the company recognized his acts through Mr. Reynolds. (Dr. Orton's deposition, printed record, p. 14; also Watson's cross-examination, printed record, p. 17). And that Watson was the only person having charge of the company's (*a foreign insurance company*) business in Milwaukee and vicinity. Mr. Reynolds was at the time a resident of Philadelphia and had no office in Milwaukee. (Watson cross-examination, printed record, p. 17.) And as there was no controversy as to these facts, the charge as given by the court could work no

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And in fact the *delivery of the policy without exacting the payment, raises the presumption that a credit is intended* and is a *waiver of the condition of prepayment.* May on Insurance, page 434, section 360, and cases cited in note 1.

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Moreover the question of the agent's authority was submitted to the jury under the charge of the Court (Printed Record p. 24)

harm to plaintiff in error under decisions cited *supra*—for the reason that had such facts been submitted to the jury the finding could not have been different.

Before commenting on the cases cited by the learned counsel of the plaintiff in error, we would respectfully call the court's attention to the erroneous impression attempted to be conveyed by him as to Watson's relation to the company herein sued. We allude to the statement that Watson was merely a solicitor, and refer your Honors to the evidence, which shows without question that Watson was the agent at Milwaukee of the insurer, who, as admitted by the pleading (see allegation in petition, printed record, page 3, which is not denied in the answer), is a corporation incorporated under the laws of the state of Maine; and that said Watson at the time of the issuing of the policy was the only person representing the company in Milwaukee and vicinity (printed record, p. 17.)

1*b*. Without going into the question as to what the court might have done under a different state of facts, we submit that the case of Miller v. Life Ins. Co., 12 Wall. 285, settles the case at bar. The jury in the suit at bar have found that the *agent* of the *defendant delivered the policy to Wm. S. Burton* with the *understanding or agreement to wait for the first premium*, or that he gave *credit* for the *first premium*. And we submit that the truth of these facts cannot be enquired into in a writ of error.

Revised Statutes of U. S. (1875), p. 188, sec. 1011.

The case, Miss. Valley Life Ins. Co. v. Neyland (9 Bush. 431), is exactly in point, and the policy contained a recital that it should not be binding until the cash part of the *first premium is actually paid in money*. *Held*, agent might deliver policy and waive the prepayment of the *first premium*.

The case of Currier v. Continenta lLife Ins. Co. (53 N. H. 538), fully sustains the principles laid down by his honor, Judge Treat, in the case at bar.

There was as much evidence of ratification of the agent's acts by the company in the present case as in the latter.

Reynolds, the general agent of the company, knew fully the facts of the delivery of the policy to and possession thereof by Berton. Both he and his company kept silence for nearly a year, and by their silence or failure to make enquiry, ratified Watson's action in the premises.

2b. As we have already stated, nearly, if not all of the cases cited by counsel for plaintiff in error have relation to *annual payment*, or attempts to revive policies after they have lapsed for nonpayment of renewal premiums, besides in more than one frauds have been perpetrated on the companies by the agents and the assured, and in the only case where the question of waiver of first *premium* was involved (viz., in Markey v. Mutual Benefit Life Ins. Co., 103 Mass. 78), there *was no delivery of the policy.*

In case of Bouton v. American Mutual Life Ins. Co., 25 Conn. 554, cited by plaintiff in error, fully sustains, as far as it goes, our theory. It was a controversy about waiver of an annual premium, and the whole case turns on the point as to whether the power given to countersign and deliver a policy gives an agent power to waive a subsequent annual premium. We do not consider that the case is of any authority in the present one, except that it cites and approves Sheldon v. Connecticut Mutual Life Ins. Co., *supra.*

The plaintiff in error's counsel attempts to make a point upon the contents of a letter introduced in evidence from G. N. Reynolds, whom counsel styles, "one who signed himself general agent of the company, though there is no evidence that his duty were other than that of soliciting insurance, which was in fact his sole duty." The letter alluded to was offered and admitted only for the purpose of showing waiver of proofs of loss, and it could not have been legally admitted for any other purpose; and the declarations therein contained could not, under any possible misconception of law, bind us, for at most it was a statement of Reynolds of information obtained by him from Watson—in what manner the letter does not state. (Printed Record, page 16.) The evidence shows that Reynolds was such general agent, but if "in fact his sole duty" was

that of soliciting insurance, we ask the learned gentleman why he did not prove that fact at the trial?

In conclusion, we respectfully submit that plaintiff in error has neither shown on *principle*, or *precedent*, any reason, whether of legal right or morals, why the verdict and judgment rendered below should be disturbed. Therefore, we pray the judgment rendered by his honor, Judge Treat, be affirmed, with damages, interest, and costs, under Rules 23 and 24 of this Honorable Court.

J. D. S. DRYDEN,
WM. S. BODLEY.
Of Counsel for Defendant in Error.